## CITATIONS

Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 71

DAVID EARL GUTKNECHT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (A. 33–38)[1] is reported at 406 F. 2d 494. The memorandum opinion and findings of fact of the district court (containing the verdict in the jury-waived trial) (A. 24–32) are reported at 283 F. Supp. 945. The memorandum opinion of the district court denying petitioner's pre-trial motion to quash the indictment because of duplicity (A. 4–6) is unreported.

[1] "A." refers to the printed joint appendix; "R.", to the clerk's record; "Tr.", to the trial transcript; and "G. Ex. 1," to Government Exhibit 1, consisting of petitioner's Selective Service file, sometimes called his "cover sheet." The "Item" numbers following "G. Ex. 1" references refer to the figures in the upper right-hand corners of the documents contained in that exhibit.

## JURISDICTION

The judgment of the court of appeals was entered on January 20, 1969. On February 11, 1969, Mr. Justice White extended the time for filing a petition for certiorari until March 21, 1969, and the petition was filed on March 19, 1969. The petition was granted on April 28, 1969 (394 U.S. 997). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in the particular circumstances of this case, and in light of the specific findings of the district court, petitioner, a Selective Service registrant already classified I–A, was properly declared to be a delinquent and ordered to report for priority induction into the Armed Forces.

2. Alternatively (in the event that the Court should determine that accelerating the induction of a delinquent registrant already classified I–A is indistinguishable in principle from delinquency reclassification to I–A coupled with accelerated induction), whether the provisions of the Selective Service regulations authorizing the reclassification to I–A and the accelerated induction of delinquents (defined as registrants who have failed to comply with duties imposed on them by the Selective Service Act or regulations) are (a) authorized by the Act, (b) consistent with constitutional safeguards against the imposition of punishment without following prescribed procedures, (c) otherwise consonant with procedural due process, (d) sufficiently definite to provide guidelines to local boards regarding the manner of their enforcement, and

(e) as applied to the duty of registrants to maintain their draft cards in their possession at all times, compatible with First Amendment liberties.

3. Whether the order directing petitioner to report for accelerated induction as a delinquent was authorized by the regulations themselves.

4. Whether the government adequately established that petitioner in fact willfully failed to submit to induction, although there was no showing that he was given an opportunity to take the traditional "one step forward" at the induction center.

5. Whether the one-count indictment, charging that petitioner failed to comply with an order of his local board directing him to report for and submit to induction, was duplicitous and thus defective.

## STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Military Selective Service Act and the Selective Service regulations involved are set forth in Appendix A to petitioner's brief (pp. 1–17); additional relevant provisions are contained in Appendix A hereto, *infra*, pp. 75–78.

## STATEMENT

Following a non-jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of willfully failing to comply with an order of his local Selective Service board directing him to report for and submit to induction into the Armed Forces of the United States, in violation of 50 U.S.C. App. 462 (A. 2, 24–32). On July 15, 1968, he was sentenced to four years' imprisonment, the judgment providing, pursuant to 18 U.S.C. 4208(a)

(2), that he would be eligible for parole at such time as the Board of Parole should deem appropriate (R. 14). The court of appeals affirmed (A. 33–38).

Petitioner, now 21 years of age, registered with the Selective Service System at Local Board No. 115, Gaylord, Minnesota, on December 20, 1965, shortly after his eighteenth birthday (A. 24, 40; Pet. Br. 3). Following a brief period during which he was classified I–A, he was, on March 15, 1966, reclassified II–S by reason of his status at that time as a college student. He retained that classification until June 21, 1967, when he was again classified I–A pursuant to his notification to his local board that he was no longer a student (A. 25; Pet. Br. 3). Contending that he was entitled to a I–O classification as a conscientious objector (he had submitted a request for that status some months previously), petitioner appealed from the I–A classification to the State Appeal Board (A. 25; G. Ex. 1, Item 15). On October 16, 1967, while that appeal was pending, petitioner participated in a "Stop the Draft Week" demonstration at the federal building in Minneapolis. During the demonstration he attempted to turn over his Selective Service registration and classification certificates to a deputy United States marshal. When the deputy marshal refused to accept the documents, petitioner dropped them at the officer's feet, together with mimeographed literature giving reasons for his actions (A. 30, 42).

On November 1, 1967, petitioner's request for conscientious objector status was denied by the State Appeal Board and he was classified I–A by that body.

Petitioner was duly notified of this action on November 27, 1967 (A. 25; G. Ex. 1, Items 1 (p. 8) and 22).

On December 20, 1967, petitioner was declared a delinquent by his local board for failing to retain his registration and classification cards in his possession at all times, as required by the Selective Service regulations (32 C.F.R. 1617.1, 1623.5) (A. 25). On the following day, December 21, a delinquency notice (SSS Form No. 304) so advising petitioner was mailed to him (A. 25, 44). The delinquency notice informed him that "[v]alid evidence" had been submitted to the board that petitioner had not at all times had and did not then have in his possession the registration and classification cards which had been issued to him by the board; advised him that he had been declared delinquent on the basis of that evidence; directed him to report immediately to his local board in person or by mail, or to take the notice to the board nearest him for advice as to what he should do; warned that his willful failure to perform the duties referred to was a violation of the Act punishable by imprisonment for as long as five years or a fine of as much as $10,000, or both; and advised that in consequence of the declaration he might be "classified in class I-A as a delinquent and ordered to report for induction" (A. 44). Petitioner took no action in response to the delinquency notice. The local board, on December 26, 1967, ordered him to report for induction as a delinquent on January 24, 1968 (A. 25).

Pursuant to the order, petitioner reported to the board's Gaylord office on the designated date and from

there, together with other reporting registrants, proceeded by bus to the Armed Forces induction center in Minneapolis (A. 10–11, 25). At the induction station petitioner informed Sergeant Billy O'Neil, the non-commissioned officer in charge of the processing section, that he had no intention to "process in any way, such as physical examination or mental" (A. 11–12, 25). The sergeant thereupon escorted petitioner to the office of Lieutenant Larry Petrie, the Assistant Processing Officer, and petitioner similarly advised that officer that he "was refusing to cooperate with the Selective Service System by taking tests, physical and mental, for the draft" (A. 12, 21, 25). Lieutenant Petrie warned petitioner that under the law refusal to submit to processing for induction was a felony punishable by up to five years' imprisonment or a $10,000 fine or both (A. 13, 21, 25–26). Petitioner said he was aware of the penalty and presented to the officer a prepared typewritten statement declaring that he was "refusing to be inducted into the United States armed forces" and stating his reasons for so doing (A. 26, n. 1). That statement said, in substance, that petitioner regarded the Selective Service System and the Vietnam conflict as "indefensible" and viewed the draft laws as "not worthy of obedience" (A. 26, n. 1). In the presence of the officer petitioner wrote on the typed statement, "I refuse to take part, or all [*sic*], of the prescribed processing," and signed his name (A. 13–14, 21, 26–47).

At the trial petitioner introduced into evidence copies of a memorandum dated October 24, 1967, and of a letter dated October 26, 1967, each from the Na-

tional Director of the Selective Service System, General Lewis B. Hershey, to local boards throughout the country (D. Exs. B and C, Tr. 105).[2] In the memorandum the Director recommended that whenever a board receives an abandoned or mutilated registration certificate or classification notice which was issued to one of its registrants the registrant should be declared delinquent for failure to have the card or cards in his possession and should be processed pursuant to the delinquency regulations. In the letter the Director noted that deferments are given only when they serve the national interest; that any action which violates the Selective Service Act, the regulations thereunder, or "related processes" are not in the national interest; and that those who commit such violations should consequently be denied deferment in the national interest. "Demonstrations, when they become illegal," the letter said, had produced much evidence that "relates to the basis for classification and, in some instances, even to violation of the act and regulations." The letter further stated that any material of this nature should be sent to local boards for their consideration and action, which in appropriate instances, if violation of the Act or regulations were established, might include declaring a registrant a delinquent and processing him accordingly.

The district court noted in its findings that reference had been made at the trial to "a certain Local Board memorandum" in which the Selective Service

[2] See Pet. Br. App. 18–21, where both documents are reprinted.

Director had "recommend[ed] procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations," but observed that the evidence clearly showed that petitioner had been declared delinquent and ordered to report for induction, "not by authority of the so-called Hershey memorandum," but because of his non-possession of his draft cards, in violation of the regulations (A. 31).[3] The district court further found that "[t]here is nothing in the Selective Service file or in any of the evidence received at trial to support the assertion that [petitioner's] classification as a delinquent and order to report for induction were based on his expressions of opposition to the Vietnam war" (A. 30).[4]

In affirming petitioner's conviction, the court of appeals initially rejected his claims that he was erroneously "not afforded the opportunity to go through the regular formal induction ceremony" and that the indictment was duplicitous in charging him with both

[3] Although the court referred in this connection to the Director's "memorandum", it appears that it was referring to the Director's letter, since only the letter referred to the participation by registrants in "demonstrations". Alternatively, the court may have intended to refer to the memorandum and letter collectively.

[4] The district court also rejected petitioner's claim that the procedures followed at the induction center were fatally defective because he was not given an opportunity to take the traditional "one step forward" signifying submission to induction. It noted that an order to report for induction "also encompasses an order to *submit* to induction," and that petitioner, by "refus[ing] to take the physical or mental tests or participate in any other procedure incident to induction," had made it clear beyond any doubt that he refused to submit thereto (A. 27–30). In an earlier opinion the court had found that there was no duplicity in the indictment (A. 4–6).

failure to report for and failure to submit to induction, relying on this Court's decision in *Billings* v. *Truesdell,* 321 U.S. 542, 557, and the district court's opinion on these points (A. 34–35). As to petitioner's claim that his accelerated induction as a delinquent was punitive, the court below noted that the district court "found that there was no evidence at the trial to support [petitioner's] contention that his delinquency order was based upon his political views," but rather that it stemmed from his violation of the possession regulations (A. 35). In distinguishing this Court's decision in *Oestereich* v. *Selective Service Bd.,* 393 U.S. 233, the court remarked that "the order of delinquency [here] did not relate to a reclassification" at all, unlike the situation there where the registrant had been entitled to a statutory exemption. Petitioner was already classified I–A and did not challenge the propriety of that classification, the court noted. While stating that "[a]dmittedly [petitioner's] induction date was advanced," the court indicated that that was done pursuant to 50 U.S.C. App. 456(h)(1), as amended in 1967, "which gives priority of induction to 'delinquents'" (A. 36).

The court below further noted that the order of induction of those classified I–A is otherwise established by regulation (32 C.F.R. 1631.7), and that since the priorities established by that regulation are "administratively created" there is "no legal reason why the order of call cannot be administratively altered as long as it is done 'impartially' without discrimination" (A. 36). Emphasizing that it was "not confronted here with a reclassification which has no

basis in fact or which attempts to deprive the defendant of any existing statutory exemption or deferment," the court concluded that the definition of "delinquency" contained in the regulations "is not unreasonable when its effect does not otherwise punish an individual by depriving him of a right given him by statute" (A. 36–37).

## SUMMARY OF ARGUMENT

### I

Because petitioner was already classified I–A when he was declared delinquent, only the validity of the delinquency regulations in causing accelerated induction is necessarily involved here. Petitioner is not a registrant who lost a deferred or exempt status to which he was otherwise entitled as a result of the application of the delinquency regulations, and the Court may thus find it unnecessary to reach the broader issue of the validity of the delinquency procedures as a whole, including the important "reclassification" provisions, in order to dispose of this case. Accordingly, we first show that the regulations, viewed in their narrower perspective, authorize the priority induction of registrants who, while in the I–A pool of manpower readily available for call, are declared delinquent for failing to comply with a duty under the Selective Service law. In the event that the Court should conclude that there is no difference in principle between accelerating the induction of a registrant already classified I–A and delinquency reclassification accompanied by acceleration of induction, as petitioner contends, we then show that the regulations,

considered in their entirety, including the reclassification provisions, are valid. It will at all events be necessary for the Court to reach the broader issue in the companion *Breen* case (if the merits of that case are considered), as well as in other cases pending before the Court, all of which involve delinquency reclassifications.

1. In the limited circumstances of this case, and particularly in view of the specific findings of the district court, petitioner was validly ordered to report for accelerated induction as a delinquent. Here the district court expressly found that petitioner's delinquency resulted from his failure to have his registration and classification cards in his possession, as required by Selective Service System regulations at least implicitly sanctioned by this Court in *United States* v. *O'Brien*, 391 U.S. 367. That court specifically determined that neither General Hershey's recommendations to local boards nor petitioner's participation in political protest activity played any part in the board's determination.

Under 32 C.F.R. 1631.7, local boards are required to meet their monthly quotas by ordering registrants classified I–A to report for induction in, as far as pertinent, the following order: (1) delinquents; (2) volunteers; and (3) unmarried non-volunteers who have attained the age of 19 years but not the age of 26 years, with the oldest being selected first. Had petitioner not been declared a delinquent, then, he would have remained in the third category and, since he was only 20 years old at the time he was ordered to report for induction, he would probably not have

been so directed until some later date. In 50 U.S.C. App. 456(h)(1), as amended in 1967, Congress, in defining the term "prime age group," in a provision relating to student deferments, as the age group designated by the President from which selections for induction "are first to be made after delinquents and volunteers," can arguably be said to have implicitly approved the application of the delinquency procedures at least to registrants classified I–A, such as petitioner, whatever might be said about its intention regarding those entitled to statutory exemptions or deferments. Moreover, in 50 U.S.C. App. 455(a)(1), as the court below noted, Congress provided simply that "[t]he selection of persons for training and service * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *." Petitioner was ordered to report for induction precisely in accordance with the mandate of this provision, and his priority status was consonant with the congressional intent manifested in the 1967 amendment to the statute.

As a registrant already classified I–A, petitioner was indisputably within the pool of manpower readily available for call for military training and service, unlike the exempt individual, such as involved in *Oestereich*. Under the present facts, petitioner was not subjected to any penal sanction so as to raise questions under the standards enunciated in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. Thus, in the narrow

circumstances of this case, at least, the delinquency regulations were validly applied.

2. If the Court concludes it is necessary to reach the issue of the validity of the delinquency regulations viewed as a whole, including the key "reclassification" provisions, they should be held valid.

Although the Selective Service Act nowhere explicitly authorizes the President to deal with delinquents otherwise than through enforcement of the penal provisions of 50 U.S.C. App. 462, the delinquency regulations reasonably implement the Act's broad purposes and policies and are authorized under the broad delegation to the President of the power to prescribe rules and regulations necessary to carry out the Act's provisions. That the delinquency regulations further the objectives of the Act has, in fact, been expressly recognized by Congress. The regulations have been in effect in substantially their present form since early in World War II, during which period Congress has on several occasions either substantially reenacted or broadly revised and amended the Act without changing or rescinding the regulations. When Congress substantially revised the Act in 1967, the committee reports of both Houses specifically noted the existence of the regulations, and Congress inserted a provision in the statute which for the first time gave explicit recognition to their existence.

Neither reclassification nor priority induction constitutes the infliction of punishment so as to call into play the constitutional safeguards that apply in criminal trials. While the requirement of the regulations

that delinquents be called for induction before all other registrants concededly bears some of the indicia of penal sanctions as summarized in *Kennedy* v. *Mendoza-Martinez, supra,* other criteria referred to in that opinion suggest a regulatory or remedial character and purpose therefor, and decisively distinguish that case.

The prime purpose of the delinquency regulations is a non-punitive one—to compel cooperation with the Selective Service System on the part of all draft-eligible young men. The objective is to discourage non-compliance with prescribed duties by those disposed to shirk their obligations by confronting them with an alternative prospect—a call to military service from which the registrant would normally be deferred or an earlier call-up than might normally be anticipated—which, while honorable, is sufficiently burdensome to most registrants to serve as an effective deterrent. Without some such device for coping with those less serious deviations from duty for which the delinquency procedures are fashioned, the Selective Service System could not function with nearly the effectiveness that the availability of this process permits.

Thus, the delinquency regulations attempt to deal with less serious breaches of duty through what in effect is a civilly coercive device. Through the issuance of a delinquency notice to a registrant in default, a return to compliance with the law on the registrant's part is first sought. Should this fail, an effort is made to make soldiers rather than defendants of those who persist in their delinquency by reclassify-

ing them I–A (if they are not already in that group) and ordering them to report for induction. Only in the case of those delinquents who exhibit the final defiance of refusal to submit to induction when ordered to do so is the Act's ultimate sanction—criminal prosecution—invoked. The suggested analogy to civil contempt is not faulty because under the regulations it is discretionary with the local board whether to remove from delinquency status a registrant who desires to correct his failure, whereas the respondent in a civil contempt proceeding is able to escape the threatened sanction simply by obeying the court's order. A fair reading of the applicable regulation in the context of the regulations as a whole suggests that, at least up to the time of the issuance of the order to report for induction, it would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty.

Another non-punitive purpose served by the delinquency regulations is the sustaining of non-delinquent registrants' morale. The realization that those who shirk their duties do not profit from their delinquency and are required under the law to "go first" helps ease the hardships of compliance for those registrants who discharge their responsibilities under the Act.

That a purpose of the delinquency procedures is to deter non-compliance with duty is not inconsistent with the sanction's regulatory character. Many unquestionably non-punitive sanctions—*e.g.*, disbarment and deportation—have deterrence as a principal if not *the* principal end.

Nor are the delinquency regulations invalid for failing to provide procedural due process. Notice and hearing are amply provided for by the regulations themselves. In any event, there is no occasion in the instant case to consider what the minimum essentials required by the Constitution are in this regard, since petitioner admittedly had notice of his delinquency and has never sought a hearing.

Finally, the delinquency regulations are not unconstitutionally vague or overboard. They simply incorporate the duties imposed on registrants by the Selective Service Act and regulations, none of which petitioner has shown to be impermissibly vague or overbroad. The requirement involved here—carrying draft cards—is certainly specific and narrow. And, as applied to that duty, the delinquency regulations neither infringe First Amendment liberties nor are unrelated to the registrants' status under the Act. Cf. *United States* v. *O'Brien,* 391 U.S. 367. Petitioner's claim that he had a right to "turn in" his draft cards as a gesture of political protest differs in no essential way from the claim made and rejected in *O'Brien.* He had a duty to keep his draft cards in his possession, and the board was authorized to declare him delinquent for failure to perform that duty. He made no effort to cure the delinquency. The regulations are both authorized by the Act and constitutionally valid.

## II

It was not necessary for the government, in order to prove that petitioner willfully failed to submit to induction, to show that he was given and that he re-

fused the opportunity to take the ceremonial "one step forward" which symbolically marks the transition from civilian to military status. While the taking of the ceremonial step marks the *culmination* of the induction process, submitting to induction includes submitting to the physical and mental examinations by which the registrant's fitness for service is tested. It would not be appropriate to require induction center personnel to ask a registrant to take the ceremonial step before he had been determined to be qualified for induction. By refusing to undergo any of the examinations designed to test his acceptability for service in the Armed Forces, petitioner willfully failed to submit to induction.

III

The indictment charged a single offense—failure to comply with an order of the local board. The charge was not duplicitous because the order directed petitioner to do two things—report for *and* submit to induction. The undisputed evidence showed that petitioner failed to comply with the latter aspect of the directive, thus violating the order viewed in its totality. Petitioner was not misled regarding the nature of the offense charged, and his contention that the indictment was deficient borders on the frivolous.

## ARGUMENT

### I. PETITIONER WAS VALIDLY ORDERED TO REPORT FOR ACCELERATED INDUCTION AS A DELINQUENT

Petitioner broadly challenges the delinquency regulations, pursuant to which he was presumably ordered

to report for induction at an earlier date than he normally would have been called, as unauthorized by the Selective Service Act (Pet. Br. 26–35), unacceptably vague (Pet. Br. 35–43), violative of constitutional restrictions upon the imposition of punitive sanctions (Pet. Br. 44–49), invalid for failue to provide procedural due process, even viewed as a civil regulatory measure (Pet. Br. 49–51), and, as applied here to the charged failure to retain possession of his draft cards, offensive to First Amendment liberties (Pet. Br. 51–58). In addition, he challenges the induction directive as unauthorized by the delinquency regulations themselves (Pet. Br. 61–66). Before proceeding to consider these contentions, it will be helpful to summarize the main provisions of the regulations and to note those which are, and those which are not, directly involved in the present case.

### A. DELINQUENCY: THE REGULATORY SCHEME

1. *Duties of registrants.* A "delinquent" is defined by the regulations as a person required to be registered who fails or neglects to perform any duty required of him under the Selective Service law (32 C.F.R. 1602.4). "[S]elective service law" is comprehensively defined to include the Act itself and all rules and regulations thereunder (32 C.F.R. 1602.10). A registrant's duties include, in addition to the basic duty of registration itself (32 C.F.R. 1611.1), the obligations, for example, of completing and returning a classification questionnaire within a prescribed period of time (32 C.F.R. 1621.10), correcting or supplementing a questionnaire upon request (32 C.F.R.

1621.13), reporting in writing within ten days of its occurrence any fact that might result in a change of classification, including any change in occupational, marital, military, or dependency status (32 C.F.R. 1625.1(b), 1641.7(a)), keeping one's local board advised of one's mailing address (32 C.F.R. 1641.3), and reporting, when ordered, for an Armed Forces preinduction physical examination (32 C.F.R. 1628.16(a), 1628.17(f)).[5] The specific duty involved here is that of retaining in one's possession at all times one's registration certificate (32 C.F.R. 1617.1) and current classification notice (32 C.F.R. 1623.5)—colloquially called "draft cards."

2. *Declaration of delinquency.* Whenever a registrant has failed to perform a duty or duties other than that of complying with an "Order to Report for Induction or Order to Report for Civilian Work,"[6] the local board "may" declare him to be a delinquent (32 C.F.R. 1642.4(a)). When a board makes such a declaration, it "shall" enter a record of its action and the date on the registrant's classification questionnaire, complete a delinquency notice (SSS Form No. 304) in duplicate stating the duty or duties not performed,

[5] Other responsibilities include keeping informed of one's draft status (32 C.F.R. 1641.5), submitting to medical examination by the local board's medical advisor upon request (32 C.F.R. 1628.3(a)), advising the board, if one is in custody, when one is released (32 C.F.R. 1642.33), and submitting evidence of one's status to a board other than one's own upon request based on suspicion of delinquency (32 C.F.R. 1642.41(c)).

[6] Orders of the latter type are issued to I-O registrants, *i.e.*, those conscientiously opposed to participation in war in any form. Cf. 32 C.F.R. 1622.14, 1660.1–1660.31.

mail the original to the registrant at his last known address, and file the copy in his cover sheet (32 C.F.R. 1642.4(b)).

The delinquency notice advises the registrant that he has been declared a delinquent because of his failure to perform a duty or duties required of him; specifies the nature of the duty or duties; directs the registrants to report to the issuing board immediately in person or by mail, or to take the notice to the local board nearest him, for advice as to what he should do; informs him that his willful failure to perform the duty or duties is a violation of the Selective Service Act punishable by up to five years' imprisonment or a $10,000 fine, or both; and notes that as a consequence of the breach of duty he is liable to be given a I–A classification as a delinquent and ordered to report for induction.[7] A registrant who has been declared delinquent "may" be removed from that status by the board "at any time"; when a delinquency is removed,[8] the board is required to record its action and the date on the classification questionnaire, advise the registrant of the removal, and place a copy of the letter of notification in his cover sheet (32 C.F.R. 1642.4(c)). No registrant may be classified in or reclassified into I–A, I–A–O,[9] or I–O[10] as a delinquent, or

[7] A copy of the delinquency notice—the document served on petitioner in this case—appears in the record at A. 44.

[8] No procedure for effecting removal is prescribed by the regulations.

[9] A registrant classified I–A–O is a conscientious objector available for non-combatant military service only (32 C.F.R. 1622.11).

[10] A registrant classified I–O is a conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest (32 C.F.R. 1622.14).

ordered to report for priority induction as a delinquent, unless he has been declared a delinquent in accordance with these procedures and has not subsequently been removed from that status (32 C.F.R. 1642.10).

3. *Classification or reclassification as a delinquent.* A delinquent registrant between the ages of 18½ and 26—and under certain conditions one who is older [11]—may be classified in or reclassified into I–A, I–A–O, or I–O (whichever is applicable) "regardless of other circumstances" (32 C.F.R. 1642.12).[12] One so classified or reclassified is entitled to appear personally before the local board to contest his classification "under the same circumstances as in any other case" (32 C.F.R. 1642.14(a); cf. 32 C.F.R. 1624.1–1624.3), and may appeal administratively from his classification as in any other case (32 C.F.R. 1642.14(c); cf. 32 C.F.R. 1626.1–1627.8). A delinquency classification or reclassification may be reopened at any time before induction, in the discretion of the local board, "without regard to the restrictions against reopening prescribed in [32 C.F.R.] 1625.2" [13] (32 C.F.R. 1642.14(b)).

[11] The conditions relate to the older registrant's prior enjoyment of a deferred status.

[12] A proviso to the cited regulation states that a registrant who by reason of service in the Armed Forces is eligible for IV–A classification (veterans; see 32 C.F.R. 1622.40) may not be classified in or reclassified into I–A, I–A–O, or I–O as a delinquent without the special authorization of the Director of Selective Service.

[13] 32 C.F.R. 1625.2 authorizes a local board to reopen a classification, at the registrant's request or on its own motion, on the basis of facts not previously considered which, if true, would justify a change of classification, provided, in either

4. *Priority induction.* When a call is made to local boards to furnish men for the Armed Forces "without designation of age group or groups," each local board is required to meet its quota from among its I–A and I–A–O registrants by ordering them to report for induction in the following order: (1) delinquents 19 years of age and older in the order of their births; (2) volunteers under 26 in the order in which they volunteered; and (3) non-volunteers, in four prescribed categories based on age and marital status (32 C.F.R. 1631.7(a)). If the call is placed "with designation of age group or groups," delinquents 19 and older and under-26 volunteers still must be called first (in that order), followed by non-volunteers of the designated age group (32 C.F.R. 1631.7(b)). In either case, though non-delinquent non-volunteers must previously have been found acceptable for service by the Armed Forces and have been mailed statements of acceptability at least 21 days before their scheduled induction date, these requirements need not be followed in the case of delinquents and volunteers. Notwithstanding these provisions, a local board may in its discretion determine not to order a delinquent registrant to report for induction if the United States Attorney requests that it not do so (32 C.F.R. 1642.13).

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event, that the classification may not be reopened after the board has mailed an order to report for induction unless the board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which he had no control. Cf. *DuVernay* v. *United States*, 394 F. 2d 979 (C.A. 5), affirmed by an equally divided Court, 394 U.S. 309.

B. BECAUSE PETITIONER WAS ALREADY CLASSIFIED I–A WHEN HE WAS DECLARED DELINQUENT, ONLY THE VALIDITY OF THE DELINQUENCY REGULATIONS IN CAUSING ACCELERATED INDUCTION IS NECESSARILY INVOLVED

Unlike the registrants in *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, and the companion case of *Breen* v. *Selective Service Local Board No. 16*, No. 65, this Term, as well as *United States* v. *Eisdorfer*, No. 330, this Term, and *United States* v. *Stewart*, No. 637, this Term, both pending on direct appeals to this Court, petitioner was not reclassified I–A as a result of his delinquency.[14] He was already classified I–A both when the violation for which he was declared delinquent was committed and when the declaration of delinquency was made (see *supra*, pp. 4–5). Indeed, petitioner does not contest that classification here. Rather, his claim is essentially that his induction as a I–A registrant was improperly *accelerated*

[14] *Oestereich* involved the delinquency reclassification to I–A of a registrant statutorily entitled to a IV–D ministerial student exemption—an action held by this Court to have been unauthorized by the Act. *Breen* involves the delinquency reclassification of a college student classified II–S (a deferred status) to I–A; the Second Circuit found it unnecessary to reach the merits of the reclassification, however, in consequence of its determination that it lacked jurisdiction under the Act to consider the issue in the context of a pre-induction suit for injunctive relief, in view of the bar of amended Section 10(b)(3) (406 F. 2d 636), a position we urge in this Court. *Eisdorfer* involves the delinquency reclassification of a I–D registrant (exempt as a reservist) to I–A pursuant to a finding by the local board that the I–D classification had been obtained fraudulently. *Stewart*, like *Breen*, involves the delinquency reclassification of a II–S registrant, but in the context of a criminal action for failure to submit to induction.

in consequence of the determination of delinquency.[15] Thus, the validity of delinquency reclassification is not directly presented here, although petitioner takes the position that his shift to priority induction status, as a result of a declaration of delinquency, is not in principle distinguishable from the reclassification situation.

If in consequence of the narrow factual context in which this case arises the Court should be of the view that it is possible to decide the case without reaching the broader issue of the validity of the delinquency procedures as a whole (including the key "reclassification" feature), petitioner's conviction can be defended on relatively narrow grounds, as set forth hereafter (*infra,* pp. 25–32). Should the Court conclude, on the other hand, that accelerating the induction of a registrant already classified I–A, in consequence of an act of delinquency, and delinquency reclassification coupled with accelerated induction are indistinguishable in principle, as petitioner urges, it becomes necessary to reach the broader issue—the validity, in effect, of the delinquency procedures viewed as a total process. We subsequently show that the regulations considered in this overall aspect are valid (*infra,* pp. 32–67). It is pertinent to note at this point that even if the Court should conclude that it is possible or desirable to dispose of the present case on the basis of the narrow considerations first presented,

[15] Petitioner's occasional references in his brief to his having been "reclassif[ied]" pursuant to the delinquency procedures (Pet. Br. 51, 52, 53) are evident inadvertences. The brief elsewhere notes that in petitioner's case the declaration of delinquency did not involve reclassification (Pet. Br. 5, 15).

those considerations are inadequate as a basis of decision either in the companion *Breen* case (if the Court reaches the merits of that case, see note 14, *supra*) or the aforementioned *Stewart* and *Eisdorfer* cases (both pending on direct appeal), since all three of those cases involve delinquency reclassifications to I–A of registrants who had previously been otherwise classified. Thus, the more comprehensive arguments which we make are at all events pertinent to, and must be reached in, those other cases.

C. IN THE NARROW CIRCUMSTANCES OF THE INSTANT CASE, AND IN VIEW OF THE DISTRICT COURT'S FINDINGS, THE DELINQUENCY REGULATIONS WERE VALIDLY APPLIED NOTWITHSTANDING PETITIONER'S ACCELERATED INDUCTION, IRRESPECTIVE OF THE VALIDITY OF DELINQUENCY RECLASSIFICATION

Preliminarily, we note that there was no showing made that petitioner, who was already classified I–A, in fact had his induction accelerated at all as a result of his local board's declaring him a delinquent. He made no offer of proof in this regard, and the district court made no finding on this point. Rather, the lower court simply noted that "[i]t was not contended at trial that the defendant's classification was improper," and concluded that "[t]here is a basis in the record" for his I–A classification (A. 27). However, the district court seemed implicitly to assume that petitioner's induction had been accelerated, in concluding that the order to report for induction resulted from his violation of the possession requirement (see A. 30, 31). And, in light of the pattern of the pertinent regulation (32 C.F.R. 1631.7), it is unlikely that petitioner, who was 20 years of age when ordered to report for

induction, would have been called at such an early date had he not been declared a delinquent. Under that regulation, unmarried non-volunteers classified I–A between 19 and 26 are called, after delinquents and volunteers, in order of their births, the oldest first. Moreover, petitioner's order to report bore on its face the stamped word "Delinquent" (G. Ex. 1, Item 25). And the court of appeals stated, "Admittedly, defendant's induction date was advanced pursuant to Tit. 50 U.S.C. § 456(h)(1) which gives priority of induction to 'delinquency' " (A. 36). Particularly in view of this statement, we assume, as did the court below, that petitioner would not have been called when he was called but for his delinquent status and the priority of induction that went along with it.

Specific findings of the district court provide strong support for the position that the present application of the delinquency regulations so as to accelerate the induction of a registrant already classified I–A was both consistent with the Act and suffered from no constitutional infirmity. First, the lower court found that the declaration of delinquency did not result from petitioner's "expressions of opposition to the Vietnam war," but rather from his violation of the possession regulations (A. 30).[16] In addition, the court determined that "[t]he evidence in the record clearly shows that [petitioner] was declared delinquent and ordered to report for induction, not by authority of the so-

[16] In similar fashion, the court of appeals rejected this claim, noting that the district court "found that there was no evidence at trial to support defendant's contention that his delinquency order was based upon his political views" (A. 35).

called Hershey memorandum, but because of [his] non-possession of the required Selective Service cards in violation of the regulations" (A. 31).[17] Thus, the district court expressly found that petitioner's delinquency resulted from neither the fact of his participation in political protest activity nor from an application of General Hershey's recommendations by his local board. Rather, his change in status was attributed by the lower court solely to his violation of the requirement of the regulations that he have his registration and classification cards in his possession at all times (32 C.F.R. 1617.1, 1623.5).

Petitioner's contention that the possession requirement is invalid since it interferes with "symbolic speech" protected by the First Amendment and serves no useful regulatory purpose is refuted by this Court's decision in *United States* v. *O'Brien,* 391 U.S. 367. Of course, the Court did not squarely consider the validity of the possession requirement in *O'Brien,* but rather a challenge to the constitutionality of the draft-card burning statute under which the defendant there had been convicted. But the Court's opinion in that case expressly rejected First Amendment arguments

[17] Just prior to this statement, the district court had noted that "[r]eference was made in the trial to a certain Local Board memorandum issued by National Selective Service Director Hershey recommending procedures to be followed by local Selective Service Boards in the cases of registrants participating in anti-Vietnam demonstrations" (A. 31). As noted previously (see note 3, *supra*), what the court had in mind was probably not the "memorandum" issued by General Hershey (see Pet. Br. App. 20–21), but rather a "letter" sent by him to all local boards at about the same time (see Pet. Br. App. 18–20). For simplicity, we shall refer to these two documents as General Hershey's "recommendations".

identical to those made here regarding the validity of the possession regulations, and in so doing determined that the possession requirement served a legitimate and useful purpose in furthering the effective functioning of the Selective Service System (see 391 U.S. at 376–380). That requirement serves to ensure the "continuing availability" of Selective Service certificates no less than the statutory provision at issue in *O'Brien* (*e.g.*, 391 U.S. at 381). That need was found sufficient to justify the prohibition on destruction there, and is plainly adequate to support the validity of the possession regulations here (see also *infra*, pp. 65–67). In view, then, of the district court's findings and the clear validity of the possession regulations which petitioner concededly violated, the delinquency procedures can properly be applied to effect his accelerated induction, regardless of their validity where a reclassification from an exempt or deferred status is involved.

As the court of appeals pointed out, the fact that no reclassification is involved here results in a substantial distinction, insofar as congressional intent is concerned, between this sort of case and one in which the registrant declared delinquent was not previously classified I–A. In the 1967 revision of the Selective Service Act, Congress, in defining the term "prime age group" as used in a provision relating to student deferments, declared the term to mean "the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers" (50 U.S.C. App. (Supp. IV) 456

(h)(1)). The reference to the regulations was obviously to the order-of-call categories created by 32 C.F.R. 1631.7. That regulation establishes the sequence in which I–A and I–A–O registrants are to be ordered inducted. Congress, in enacting the provision referred to, gave explicit recognition, for the first time, to the delinquency concept. More important, for present purposes, Congress did so in the context of a reference to a regulation which relates exclusively to I–A (and I–A–O) registrants. It can thus be said that Congress gave implicit approval to the delinquency procedures established by the regulations at least as regards registrants already classified I–A as of the time of the declaration of delinquency. Unlike the situation with respect to those in a status exempted by statute, there are no arguably conflicting manifestations of congressional intent, such as the Court found in *Oestereich,* which might be thought to defeat delinquency-triggered induction.

Moreover, in 50 U.S.C. App. 455(a)(1), Congress can arguably be said to have drawn an explicit distinction in this regard. That provision states that "[t]he selection of persons for training and service * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *." As the court below pointed out, both the delinquency and priority of induction provisions are just such rules and regulations as the Selective Service System is authorized, pursuant to this sec-

tion, to adopt. Those regulations were applied here in "an impartial manner" since their application was occasioned by a plain violation of valid regulations, not for some discriminatory purpose. As the court of appeals concluded, there is "no legal reason why the order of call cannot be administratively altered as long as it is done 'impartially' without discrimination" (A. 36). In view of the board's "administrative discretion in carrying out congressional policy," the application of the delinquency regulations was "reasonably related to a governmental interest" and was justifiable where "its effect does not otherwise punish an individual by depriving him of a right given him by statute" (A. 37). Since only "the order of call for induction of those already classified 1–A" was involved here, the court below determined that application of the delinquency procedures was a "reasonable condition" that lawfully could "be administratively attached to it" (A. 37). In concluding, the court noted that petitioner had notice of his delinquency and an opportunity to correct it (A. 37). Since his right to be called in a particular order "was one which had been given only by administrative grace and which had been reasonably conditioned upon overall compliance with the Selective Service laws," his accelerated induction, the court concluded, "was not lawless or irregular" (A. 38). That determination, we submit, is, in the narrow circumstances of this case, a correct one and should be upheld, whatever the Court may conclude as to the validity of delinquency reclassification.

Petitioner was plainly within the pool of manpower readily available for call for military training and service. All that stood between him and an immediate callup was the level of manpower needed. He admittedly violated a valid provision of the regulations. As a result of this violation he was declared a delinquent, an action wholly consistent with the statutory scheme and in no sense inconsistent with congressional intent. Had any reliance been found to have been placed on either General Hershey's recommendations or petitioner's participation in political protest activities, a question could be raised as to the impartial and even-handed administration of the delinquency procedures. But the district court here made specific findings that neither of these matters played any role in the local board's action, and those findings were concurred in by the court of appeals. They are thus entitled to considerable deference by this Court. See *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. Nor can it be said, under the present facts, that petitioner was subjected to any penal sanction so as to raise any issue regarding the imposition of punishment without constitutional safeguards under the tests enunciated in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 168–169. As the court of appeals emphasized, "we are not confronted here with a reclassification which has no basis in fact or which attempts to deprive the defendant of any existing statutory exemption or deferment" (A. 36–37). At most, all that happened to petitioner, as a result of his violation of the regulations and his failure to rectify his delinquency, was that he was ordered to report for in-

duction somewhat sooner than he otherwise might have been. In these narrow circumstances, the delinquency regulations, in triggering accelerated induction, constitute a lawful means for carrying out the objectives of the Selective Service Act in providing manpower for the Armed Forces.

D. SHOULD THE COURT DEEM IT NECESSARY TO REACH THE ISSUE OF THE VALIDITY OF THE DELINQUENCY PROCEDURES VIEWED AS A WHOLE, INCLUDING THE PROVISION FOR DELINQUENCY RECLASSIFICATION, THE REGULATIONS ARE VALID

In the ensuing discussion, as previously noted, we proceed on the assumption that there is no distinction in principle between accelerating the induction, for delinquency reasons, of a registrant who is already classified I–A and the delinquency reclassification *to* I–A (accompanied by expedited induction) of a registrant who has an otherwise valid claim to deferment. It is the position of the government that, with the narrow exception of the situation involved in the *Oestereich* case, 393 U.S. 233 (delinquency reclassification to I–A of a registrant possessing an unqualified *statutory exemption*), the scheme of the regulations is authorized by the Act and suffers from no constitutional infirmity.

*1. The delinquency regulations are authorized by the Act and have been implicitly approved by Congress*

Although the Selective Service Act nowhere explicitly authorizes dealing with violations of the Act or regulations otherwise than by a criminal prosecution pursuant to the general penal provisions, the

delinquency regulations reasonably implement the Act's general purposes and policies and are authorized under the broad delegation to the President of the power to prescribe rules and regulations necessary to carry out the provisions of the Act (50 U.S.C. App. 460(b)(1)). Where a registrant fails to perform a duty required of him under the Act or regulations (thereby becoming, by definition, a delinquent), it is obviously beneficial both to him and to the Selective Service System that he not be immediately subjected to criminal prosecution for his violation. It may often happen that the registrant's failure to comply was either inadvertent or impulsive and that, given the chance to reflect upon his conduct and the potential consequences thereof, he would choose a different course of action and take steps to purge his delinquency. In effect, the operation of the delinquency regulations postpones the imposition of criminal punishment under 50 U.S.C. App. 462 and gives the registrant an opportunity to bring himself back into compliance with the law. And the delinquent is allowed to correct his delinquency, under the provisions of 32 C.F.R. 1642.4, at any time. Although removal from delinquency status is discretionary with the local board (but see *infra*, pp. 52–54), there is no reason to speculate here that the board might have refused to remove petitioner's delinquent status had he in good faith sought to bring himself back into compliance. To the contrary, the record indicates that petitioner made no attempt to correct his delinquency and had no intention of doing so.

That the delinquency regulations further the objectives of the Act has, in fact, been expressly recognized by Congress. The regulations have been in effect, in substantially their present form, since the enactment of the Selective Service Act of 1948 (62 Stat. 604).[18] Indeed, the current regulations are substantially similar to those in effect since early in World War II,[19] and thus the concept goes back almost thirty years. During this lengthy period Congress, although presumably aware of the regulations, did nothing to change or rescind them. This inaction by Congress is of particular significance in light of the fact that on at least four occasions during this period—in 1946, 1948, 1951, and 1967—it either substantially reenacted or broadly revised and amended the basic conscription

[18] See Selective Service regulations issued September 17, 1948 (13 Fed. Reg. 5479, 5483): §§ 631.7 and 642.13 (priority induction); § 642.12 (classification or reclassification as a delinquent); § 642.14(a) (right of personal appearance as in any other case); § 642.14(b) (classification reopenable at any time before induction without regard to otherwise applicable general restrictions); § 642.14(c) (classification appealable as in any other case).

[19] See Selective Service regulations issued October 4, 1943 (8 Fed. Reg. 14116): § 642.12(a) (classification or reclassification as a delinquent): § 642.13(a) (delinquents to be inducted as soon as possible after required 10-day notice without reference to order-number sequence or dependency groups); § 642.14 (a) (right of personal appearance as in any other case); § 642.-14(b) (classification reopenable at any time before induction unless board determines delinquency was knowingly incurred): § 642.14(c) (classification appealable as in any other case; if appeal board finds registrant knowingly became delinquent, it confirms the I–A, I–A–O, or IV–E (now I–O) delinquency classification or reclassification; otherwise, it disregards the delinquency and classifies in usual manner).

statute in effect throughout virtually the entire span.[20] As this Court has often indicated, a consistent and long-continued interpretation of an enactment by the administrative agency charged with its enforcement, particularly when Congress has reenacted the statute without repudiating the construction, is entitled to great weight in determining the correctness of the interpretation or the existence of the claimed authorization for a regulation. *Commissioner* v. *Noel Estate,* 380 U.S. 678, 681–682; *Massachusetts Trustees* v. *United States,* 377 U.S. 235, 241–242; *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 365–366; *Francis* v. *Southern Pacific Co.,* 333 U.S. 445, 449–450; *Fleming* v. *Mohawk Co.,* 331 U.S. 111, 116; *Billings* v. *Truesdell,* 321 U.S. 542, 552–553; *Morgan* v. *Commissioner,* 309 U.S. 78, 81; *Helvering* v. *Winmill,* 305 U.S. 79, 82–83; 2 Sutherland, *Statutes and Statutory Construction,* §§ 5107, 5109 (3d ed. 1943).[21]

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[20] The Selective Training and Service Act of 1940 (54 Stat. 885), the conscription statute in effect during World War II, was expressly reenacted in 1946 except as to specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In 1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).

[21] Nothing in *Leary* v. *United States,* 395 U.S. 6, relied on by petitioner (Pet. Br. 31), is inconsistent with the principle referred to. *Leary* involved a regulation which *conflicted with* the statute (395 U.S. at 24–25). Where such conflict exists, the principle of implied approval through reenactment has, of course, no place (see 395 U.S. at 25).

Nor is the inference of congressional ratification merely a negative one based on repeated reenactment without repudiation. When Congress substantially revised the Act in 1967, it is significant that the committee reports of both Houses specifically noted the existence of the delinquency regulations (S. Rep. No. 209, 90th Cong., 1st Sess., pp. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess., p. 17). Even more significantly, in its 1967 revision of the Act, Congress not only failed to modify the delinquency regulations, but it inserted a provision in the statute which for the first time gave express recognition to them. Section 6(h)(1) of the Act as amended (50 U.S.C. App. (Supp. IV) 456(h)(1)), after referring to the "prime age group" of registrants in a provision relating to student deferments, defines that term to mean "the age group which *has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers*" (emphasis added).[22] See also Section 5(a)(2) of the Act, as amended in 1967 (50

[22] Petitioner's suggestion that the Act's "reference to 'delinquents' could as easily have been intended to refer to 'undeclared delinquents'" as to registrants who have been declared delinquent under the regulations (Pet. Br. 31) is baseless. The Act's reference to "the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers" is an evident allusion to 32 C.F.R. 1631.7. That regulation, providing for the priority induction of delinquents and volunteers ahead of all other registrants, is in turn linked to 32 C.F.R. 1642.13, which calls for the induction of delinquent registrants "in the manner provided in section 1631.7 of this chapter [*i.e.*, 32 C.F.R. 1631.7]." In its context as part of Part 1642 of the regulations

U.S.C. App. (Supp. IV) 455(a)(2)), by which Congress prohibited the President from changing the order of induction by age groups in effect on the date of the amendment without specific subsequent statutory authority. As noted previously (see *supra,* p. 22), the administratively established induction sequence calls for the induction of delinquents 19 years of age and older before registrants of all other categories. In short, the delinquency regulations as they now stand are an accepted and long-established feature of the Selective Service System, which Congress has at least implicitly ratified and sanctioned.

In light of Congress' implied ratification of the delinquency procedures, there is no merit in petitioner's contention that Congress's delegation to the President of authority to make such regulations is void for want of standards (Pet. Br. 32–35). In all events, insofar as the challenged regulations constitute a reasonable implementation of the delegated power to raise armies through the conscriptive process (see *infra,* pp. 45–58), the authority to make the regulations is fairly to be found within the general grant of power to the President to prescribe "the necessary rules and regulations to carry out the provisions of" the Act (50 U.S.C. App. 460(b)(1)). Cf. *Falbo* v. *United States,* 320 U.S. 549, 552; *Selective Draft Law Cases,* 245 U.S. 366.

It may be said that the Court in *Oestereich* v.

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(dealing generally with "Delinquents"), it is evident that 32 C.F.R. 1642.13 is exclusively concerned with registrants who have been *declared* delinquent, pursuant to the procedures prescribed by 32 C.F.R. 1642.4.

*Selective Service Bd.*, 393 U.S. 233, has rejected the argument that Congress implicitly authorized delinquency reclassification. There are, however, arguable distinctions between that case and other situations where delinquency reclassification is involved. Indeed, it would seem proper to differentiate between administrative action purporting to take away a *permanent exemption* from military service (which *Oestereich* held unauthorized) and cancelling a *temporary deferment* (as in the case of a college student reclassified I–A because of a declaration of delinquency, such as in the companion *Breen* case).

*2. Neither reclassification nor priority induction is punitive within the meaning of the Constitution's restrictions on the infliction of punishment without the requisite safeguards*

The question remains whether the delinquency regulations, as a general matter, operate as a penal sanction, imposed without the procedural safeguards which the Constitution prescribes.[23] In *Kennedy* v. *Mendoza-*

[23] In the government's brief in the *Oestereich* case (pp. 44–58), it was indicated that in some circumstances the operation of the delinquency regulations might raise serious statutory and constitutional questions. But that was suggested in relation to a situation where application of these regulations had the effect of removing a registrant from a statutorily exempt status. There, moveover, it was not entirely clear that the local board had not, at the invitation of General Hershey, triggered the operation of the delinquency regulations to punish the registrant's participation in political protest activity. As indicated in that brief (p. 43), if General Hershey's recommendations be viewed as construing the lawful scope of the delinquency regulations too broadly, the proper response is to correct his interpretation rather than invalidate the regulations themselves. See *National Student Ass'n* v. *Hershey*, 412 F.2d 1103 (C.A.D.C.), where the court of appeals took that course.

*Martinez,* 372 U.S. 144, this Court held that the denationalization of a native-born citizen, for departing from or remaining without the United States in time of war or national emergency for the purpose of avoiding military service, was a punitive measure which Congress could not impose without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.[24] There the Court described "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character" in the following language (372 U.S. at 168–169):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. * * *

In *Mendoza-Martinez* the court found "detailed examination along such lines" unnecessary because the "ob-

[24] *E.g.*, indictment, trial by jury, confrontation by witnesses, compulsory process for obtaining favorable testimony, and the right to counsel.

jective manifestations" of the congressional purpose, as reflected in the statute's legislative history, pointed conclusively to its punitive character (*id.* at 169). The Court noted, on the other hand, that the problem had, in other cases, been "extremely difficult and elusive of solution" (*id.* at 168).

*a.* The *Mendoza-Martinez* criteria, applied to the sanction involved in this case, admittedly point, in the words of the Court, "in differing directions." The requirement of the regulations that a I–A registrant as to whom an unremoved declaration of delinquency has been made by his local board be inducted before all other registrants concededly bears *some* of the indicia of a penal sanction as summarized in the Court's opinion. For example, the sanction undoubtedly "comes into play only on a finding of *scienter*" [25] and

[25] It is at least clear that an *inadvertent* failure by a registrant to comply with a duty—provided he promptly remedied the neglect when his attention was called to it, through a delinquency notice or otherwise—would almost certainly never eventuate in the imposition of the sanction, and in our view could not validly do so. That it would be at least an abuse of discretion for a board to impose the sanction of priority induction in the case of the innocent or merely careless delinquent would appear to be implicit in the provisions that one who has been declared a delinquent may be removed from that status at any time (32 C.F.R. 1642.4(c)) and that classification or reclassification as a delinquent may be reopened at any time before induction, without regard to generally applicable restrictions on reopening (32 C.F.R. 1642.14(b)). It is apparent from the delinquency regulations as a whole that the overriding objective is to encourage the prompt correction of unintentional delinquencies and the prompt purging of those that may have been willful.

"the behavior to which it applies is already a crime." [26] In a sense, moreover, the sanction "involves an affirmative disability or restraint"—*i.e.*, change in status resulting in enforced induction [27]—though it is evident that the "restraint" has little real significance in this context since it is of precisely the same character as that of non-delinquent inductees, whose status manifestly has no punitive aspect (see *infra*, pp. 42–45). And the operation of the sanction will concededly promote one of the "traditional aims of punishment," deterrence [28]—although, as stressed below (*infra*, pp.

[26] *I.e.*, *knowingly* failing to perform a duty imposed by the statute or regulations—an offense under 50 U.S.C. App. 462(a). Where *scienter* is lacking, the regulations appear to contemplate that the registrant may in some circumstances be declared delinquent (32 C.F.R. 1642.4(a) and (b))—subject, however, to removal from that status upon correction of the neglect following notice (32 C.F.R. 1642.4(c)). It is at all events clear that, as pointed out in the preceding footnote, an inadvertent neglect of duty would as a practical matter never result in the issuance of a priority induction order.

[27] The availability of habeas corpus to secure release from the Armed Forces where induction has been improper (see, *e.g.*, *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304) sufficiently attests to the "restraint" that induction has traditionally been thought to entail.

[28] The Court in *Mendoza-Martinez* coupled "retribution" with deterrence as the "traditional aims of punishment" (372 U.S. at 168). Insofar as "retribution" implies the vindictive, vengeful, or retaliatory infliction of harm in requital for past misdeeds, neither priority induction nor delinquency reclassification promotes or was intended to effect such an aim. The acceleration of the process by which a registrant is inducted into a status bearing no stigma of any kind (rather, the contrary) and to which he will in all likelihood be subjected in any event sooner or later can in no way be regarded as an act of vengeance or vindictiveness. Nor can delinquency reclassification be so viewed. In view of the opportunity which a regis-

59–61), mere deterrent effect, even where intended, does not always signify a penal sanction. Moreover, where delinquency reclassification and not simply priority induction is involved, the impact of these factors is certainly greater. On the other hand, the other criteria referred to in the *Mendoza-Martinez* opinion point in the opposite direction—to a regulatory or remedial character and purpose—and distinguish this case from that one.

*b.* One of the tests for determining whether sanctions are penal referred to in *Mendoza-Martinez* is whether the particular sanction "has historically been regarded as a punishment" (372 U.S. at 168). The importance of this criterion is underscored by the exhaustive examination the Court made of the legislative history of the denationalization statute to determine the attitudes of its sponsors in this regard (*id.* at 170–184). No such historical inquiry is needed to show that the sanction involved here is unlike the sanction of deprivation of citizenship involved there.

It is a matter of common knowledge, judicially known to the Court, that service in the Armed Forces of the United States has never been deemed punitive in character. Whether volunteered or conscripted, such service has always been viewed as an honor and a privilege, or at least an accepted duty of citizenship,

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trant has under the regulations to secure the removal of delinquency status (see *infra*, pp. 52–55), retribution clearly cannot be ascribed as a goal of the regulations. Cf. *Anderson* v. *Hershey*, 410 F. 2d 492, 498, n. 16 (C.A. 6), pending on petition for a writ of certiorari, No. 449, this Term. On the other hand, it can hardly be doubted that the sanction is intended to deter draft-related delinquent behavior (see *infra*, pp. 46–52).

never as punitive or degrading. *Selective Draft Law Cases,* 245 U.S. 366, 378, 390; *Anderson* v. *Hershey,* 410 F. 2d 492, 498–499 (C.A. 6), pending on petition for a writ of certiorari No. 449, this Term; *Oestereich* v. *Selective Service System Local Board No. 11,* 390 F. 2d 100 (C.A. 10), reversed on other grounds, 393 U.S. 233; *United States* v. *Capson,* 347 F. 2d 959, 962 (C.A. 10), certiorari denied, 382 U.S. 911. As the court noted in *Anderson* v. *Hershey, supra* (distinguishing *Mendoza-Martinez*), "induction has *not* historically been regarded as punishment" (410 F. 2d at 498). Persons with military records have traditionally pointed to their service with pride, and military service normally entitles an individual to a variety of veterans' benefits under both State and federal law. Honorably discharged veterans both of World War II and of the Korean conflict who had served in active status for a year or longer were granted full presidential pardons for all violations of federal law (except the laws for the government of the Armed Forces) whereof they had been convicted prior to their induction. Proclamation No. 2676 of December 24, 1945 (60 Stat. 1335); Proclamation No. 3000 of December 24, 1952 (67 Stat. c23). The idea that service is an honor is so prevalent in our thinking that Congress felt obliged to provide specifically in the Selective Service Act that conviction of a minor criminal offense is not a bar to service (50 U.S.C. App. 456(m)). Such burdens and hardships as accompany military service have always been regarded as unavoidable incidents of the "supreme and noble duty of contributing to the defense of the rights and honor of the na-

tion" (*Selective Draft Law Cases, supra,* 245 U.S. at 390), never as stigmatizing. In short, there is a clear contrast between induction into the Armed Forces and the punitive sanction of denationalization involved in the *Mendoza-Martinez* case.

Nor are these considerations affected by the fact that the delinquent's induction is *accelerated*—whether the registrant involved is already classified I–A or was reclassified into that category. Given the burdensome character of conscripted service and the peril to life and limb to which the soldier may be subject, it is natural and inevitable that many who are called will wish to defer to the extent possible—and even avoid altogether—the commencement of their tour of duty. But the mere expedition of induction, notwithstanding the objective of deterrence which the threat thereof concededly serves, cannot convert what is creditable into a stigmatizing or degrading estate. As the Director of Selective Service, replying to an inquiry by Representative Stafford as to whether the draft should "be used for punitive purposes," observed:

> When a man has violated the selective service law itself, the acceleration of his processing toward induction is not deemed to be "punitive". The law has placed the obligation to serve on virtually every man within the liable ages. Service is characterized in the law, properly, as a privilege and a duty.
>
> * * * The acceleration of processing for one who has violated the selective service law is merely a means of giving him an early oppor-

> tunity to comply with the law rather than to be prosecuted. * * * [29]

If conscripted service is an honor, neither the mere advancing of the date of its scheduled commencement, nor indeed the requirement of service on behalf of registrants who might otherwise not be called, can properly be regarded as punishment.

*c.* A second *Mendoza-Martinez* criterion of punitiveness is whether an alternative (*i.e,* non-penal) purpose to which the sanction "may rationally be connected is assignable for it"—and, if so, whether the sanction "appears excessive in relation to the alternative purpose" (372 U.S. at 168–169).[30] The calling

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[29] Hearings before the Committee on Armed Services, House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29, and 30, 1966, *Review of the Administration and Operation of the Selective Service System* [Doc. No. 75], 9903. The correspondence between General Hershey and Representative Stafford, so far as pertinent, appears in Appendix B, *infra*, pp. 79–83.

[30] Cf. *Flemming* v. *Nestor*, 363 U.S. 603, 611–621 (termination of deported alien's social security benefits if deportation was on any of stated grounds sustained as non-penal; suggested regulatory purpose, to minimize foreign disbursements under pertinent statute); *Helvering* v. *Mitchell*, 303 U.S. 391, 398–405 (deficiency assessment in amount of 50 percent of tax due for fraudulently understating same held remedial; suggested nonpunitive purpose, to protect revenue and reimburse government for expenses of investigation). And see *De Veau* v. *Braisted*, 363 U.S. 144 (statutory disqualification of persons convicted of felony from holding office in waterfront labor organizations held validly regulatory); *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (imposition of fixed sum as "liquidated damages," in addition to fine, for defrauding government sustained as remedial); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548–552 (same; double damages plus $2,000 forfeiture, recoverable in civil *qui tam* action).

of delinquents to duty before other I–A registrants has at least two valid non-punitive purposes—as does the reclassification as delinquents of other registrants not classified I–A who violate the Act or the regulations.

i. The fundamental purpose of the priority induction sanction specifically involved here—as indeed of the delinquency regulations generally—is to induce cooperation with the Selective Service System on the part of all draft-eligible young men. The objective, otherwise stated, is to discourage non-compliance with duty by those who might be disposed to shirk their obligations—by confronting them with an alternative prospect which, while honorable, is unpleasant enough to most registrants to serve as an effective deterrent, yet falls decisively short of the Act's ultimate sanction, the provision for conventional punishment. That prospect is a change in status, sometimes accompanied by reclassification, which results in accelerated induction—a speedier call to duty than the registrant might normally anticipate.[31]

The sanction in issue—application of the delinquency procedures—it should be emphasized, is ordinarily a device for dealing with relatively minor breaches of duty. The ultimate dereliction of duty, refusal to report for or submit to induction when ordered, can be dealt with only penally. Compelled induction would obviously be ineffectual where the

[31] Different considerations of course might come into play where a registrant is in an exempt status, such as was the situation in *Oestereich*, for there, but for his delinquency, the registrant might never be subject to call at all (see *supra* p. 37–38).

very dereliction involved is refusal to serve at all (cf. 32 C.F.R. 1642.4(a)). But without such devices as reclassification, where necessary, and priority induction for dealing with less serious deviations from duty, the effectiveness of the Selective Service System's functioning would be significantly impaired.

If the *sole* permissible way of dealing with those less grave breaches of duty for which the delinquency regulations were fashioned—failure to return one's classification questionnaire, failure to report a change in eligibility status, failure to keep the board advised of one's mailing address, refusal to carry one's draft cards, failure to report for an ordered physical examination, and the like (see *supra,* pp. 18–19)—were the commencement of a criminal prosecution, the System might well falter in its attempt to discharge the difficult and delicate task it is called upon to perform under the Act. The Selective Service System, as much perhaps as our tax system, depends for its efficient operation on the voluntary cooperation of those subject to it. Particularly when the country is engaged in as divisive and frustrating a conflict as our engagement in Vietnam has proved to be, when the national objective is as limited as it is in this encounter, and when, precisely as a consequence of the conflict's limited goals, the difficult issue from a Selective Service standpoint is who shall be required to serve when not all must (see also *infra,* pp. 57–58), the number—actual and prospective—of such relatively minor derelictions becomes too great for the Act's penal clause alone to provide a fully adequate deterrent—or one whose enforcement is, as a matter of policy, desirable.

The dimensions of the problem are suggested by the substantial numbers of delinquents reported by the Nation's draft boards as popular discontent with our Vietnam commitment has increased. The significance of the volume of delinquents lies not alone in their numbers but equally in the ominously rising curve which they trace. As of June 30, 1966, local board files listed a total of 13,631 "delinquents" among I–A and I–A–O registrants alone.[32] After dipping briefly, and slightly, to 13,627 as of June 30, 1967,[33] the reported corresponding figure for subsequent reporting dates has risen as follows:[34]

| | |
|---|---|
| As of December 31, 1967 | 16,935 |
| As of June 30, 1968 | 22,103 |
| As of December 31, 1968 | 23,658 |

These figures refer, of course, to all types of delinquency, including failures to report for or submit to induction (as to which prosecution is the only possible sanction) as well as those less serious neglects of duty for which reclassification and accelerated induction may be effective alternative deterrents. While there is no readily available breakdown of the figures into the two categories of delinquency mentioned, we are informed by Selective Service officials that, based on

[32] Annual Report, Director of Selective Service, Fiscal Year 1966, pp. 64, 66.

[33] Annual Report, Director of Selective Service, Fiscal Year 1967, pp. 66, 68.

[34] Semi-Annual Reports, Director of Selective Service: Period July 1 to December 31, 1967, pp. 30, 32; Period January 1 to June 30, 1968, pp. 36, 38; Period July 1 to December 31, 1968, pp. 32, 34.

their experience, a substantial majority of these totals have been delinquencies of the less serious sort.[35]

A similar story is told by a related group of statistics. Whereas during the fiscal year 1961 a total of 16,988 cases of reported delinquency of all types were considered sufficiently serious to be referred to the Department of Justice for investigation, by fiscal 1966 this number had risen to 26,830, by 1967 to 29,128, by 1968 to 29,485, and during the first half of fiscal year 1969 alone to 15,772.[36] As youthful resistance to the draft and to our Vietnam undertaking has increased, the corresponding figures in both categories of statistics are almost certainly higher now.[37] If the government's sole means of coping with the situation were the institution of ordinary criminal proceedings in a sufficiently large number of cases to make significant inroads on the delinquency rate through the normal operation of the deterrent factor, it seems apparent that the already crowded criminal calendars of our federal courts would have little room for anything else.

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[35] The most common of these have apparently involved failure to file current information questionnaires, failure to notify local boards of address changes, and failure to report for scheduled physical examinations.

[36] Annual Reports, Director of Selective Service: Fiscal Year 1961, p. 18; Fiscal Year 1966, p. 22; Fiscal Year 1967, p. 27. Semi-Annual Reports: Period January 1 to June 30, 1968, p. 15; Period July 1 to December 31, 1968, p. 10.

[37] The mass turn-ins of draft cards which have occurred from time to time in recent years, culminating in the nationwide "Stop the Draft" demonstrations of October 1967 (cf. *supra*, p. 4), suggest the substantiality of that statistic alone.

The delinquency regulations attempt a solution to this problem. Under them, use of the Act's criminal sanction is reserved for those "hard core" intransigents who commit the ultimate delinquency of refusal to submit to induction. Delinquencies less serious in nature are dealt with through what in effect is a civilly coercive device. The reclassification and priority induction sanctions arm the Selective Service System with a club, as it were, by which defiant as well as merely negligent registrants are *constrained* to comply with their duties—or face a distasteful albeit honorable alternative. Through the issuance of a delinquency notice to a registrant who it has evidence is in default as regards an obligation, the System first seeks, in as many instances as possible, to effect a return to compliance with the law—correction of the oversight if there was negligence merely, expunging should willfulness appear.[38] Should this fail, an effort is made to make soldiers rather than defendants of

[38] On occasion it may happen that the registrant recipient of a delinquency notice has committed no breach of duty at all—that the board was simply mistaken in declaring him delinquent. In that event the notice serves the alternative function of initiating exploration of the basis of the board's misunderstanding and the ironing out of whatever the difficulty has been. Viewed in this aspect, the delinquency notice is the equivalent of a show-cause order, directing the registrant to show cause why he should *not* be processed as a delinquent. In the instant case, the local board had solid evidence that petitioner had dispossessed himself of his draft cards—including, apparently, the documents themselves, which appear to have been turned over to the Selective Service authorities shortly after petitioner had discarded them on the steps of the federal building in Minneapolis during the "Stop the Draft Week" demonstration (A. 39; see *supra*, p. 4).

those who persist in their delinquency by ordering them to report for induction.[39] Only in the case of those delinquents, hopefully few in number, who, resisting the induction directive as well, exhibit the final defiance of refusal to serve when ordered, is the Act's ultimate sanction—criminal prosecution—invoked. Cf. Selective Service System, *Legal Aspects of Selective Service,* pp. 46–47 (1969 rev.):

> Selective Service Regulations are designed to delay the prosecution of a violator of the law until after he has failed to report for or refused to submit to induction or assigned civilian work. This is to prevent, wherever possible, prosecutions for minor infractions of rules during his selective service processing, thereby reducing the number of cases that reach the courts and also giving the registrant, before being prosecuted, an opportunity to report for service in the armed forces. Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a regis-

[39] The election by the System to order the delinquent inducted rather than to press for prosecution for the delinquency can work to the registrant's advantage. If the delinquent reports for induction as ordered but fails to pass his physical examination or he is otherwise unacceptable to the Armed Forces, he escapes both the Army and the penitentiary. If the delinquent reports for induction as ordered but is rejected for service at the induction center, it is the invariable practice not to prosecute him for the violation of the regulations for which he was declared delinquent. It is to be noted that petitioner, by refusing to submit to medical examination at the induction station (see *supra*, p. 6, and *infra*, pp. 71–73), did not give the Army the opportunity to reject him for physical or related reasons. He thus forfeited the possibility of profiting from the practice to which we have referred.

> trant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work.

So viewed, the delinquency regulations give to local boards a sanction not unlike the judicial power of civil contempt. Cf. *Shillitani* v. *United States,* 384 U.S. 364, 368–372; *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590; *United States* v. *United Mine Workers,* 330 U.S. 258, 300 n. 73, 305; *Lamb* v. *Cramer,* 285 U.S. 217, 221; *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 441–442.

It may be objected that the civil contempt analogy is unpersuasive because under 32 C.F.R. 1642.4(c) it is discretionary with the local board whether to remove from delinquency status a registrant who desires to correct his failure, whereas the respondent in a civil contempt proceeding is able to avoid the coercive sanction by obeying the court's order.[40] But the answer to that point is that, while the applicable regulation on its face does indeed make removal from delinquency status discretionary, a fair reading of the regulation in the context of the regulations as a whole suggests that, at least up to the time of the issuance of the order to report for priority induction, it

[40] As a consequence of their power to avoid the sanction through submission, civil contempt respondents as to whom the sanction invoked is confinement are said to "carry 'the keys of their prison in their own pockets'" (*Shillitani* v. *United States, supra,* 384 U.S. at 368, quoting from *In re Nevitt,* 117 Fed. 448, 461 (C.A. 8)). See also *Gompers* v. *Bucks Stove & Range Co., supra,* 221 U.S. at 442.

would be an abuse of discretion for a board to refuse removal in the case of a registrant who sought in good faith to correct his breach of duty. The regulation provides, for example, that the delinquent may be removed from that status "at any time." Another regulation provides that where a registrant has been classified or reclassified as a delinquent (*i.e.*, reclassified I–A or I–A–O in consequence of his delinquency), the classification may be reopened at any time before induction, notwithstanding the restrictions on reopening which the regulations otherwise impose (32 C.F.R. 1642.14(b)).[41] And it seems clear from the regulatory scheme as a whole, as previously suggested (note 25, *supra*), that the central objective of the delinquency regulations is to encourage the prompt correction of inadvertent delinquencies and the purging of those that may have been willful. It appears implicit, in short, in the regulations viewed as an entirety that at least prior to the issuance of an induction order the board not only may but *should* permit even a willful delinquent, if he in good faith seeks to bring himself into compliance, to escape the sanction.[42] Thus, the civil contempt analogy becomes

[41] See note 13, *supra*, for the terms of the otherwise applicable restrictions on reopening.

[42] Whether the desire to comply and the promise to abide by his duties in the future are in good faith would of course be a matter of judgment as to which the area of discretion would be large. If, for example, the delinquency were the registrant's second, a prior delinquency having been removed by the board pursuant to the registrant's offer to comply with his neglected duty, it would clearly be an appropriate exercise of discretion for the board to reject a new offer to purge and to order the registrant inducted as a delinquent.

apt if, as suggested, it would be an abuse of discretion for a board to refuse to remove a registrant from delinquent status upon his indication of willingness to comply with the duty whose breach had occasioned the delinquency declaration.[43]

There are respects, to be sure, in which the civil contempt analogy is imperfect. The contempt procedure, for example, is tailored to the enforcement of

[43] Once an order to report for induction has been issued, however, it is probably too late for the delinquent registrant to escape the consequences of his delinquency as a matter of right. It is too late then, that is to say, for a delinquent who would make amends to do other than invoke the board's discretion to relieve him of the duty to submit to induction. There can be no doubt as to the power of the board, even at that late hour, to relieve the registrant from the duty of compliance upon a proper indication of his desire to terminate his recalcitrance. 32 C.F.R. 1642.4(c) expressly provides, as noted previously, that removal from delinquent status may be effected *at any time*. Once an induction order has been issued, however, there is manifestly less basis for suggesting that a board would abuse its discretion by declining to exercise its authority to remove than in the situation where no induction order had as yet been given. Nevertheless, should this Court be of the view that the civil contempt analogy is sound, but that for the regulations to pass constitutional muster a registrant must have it within his power at any time up to the point of scheduled induction to effect removal of his delinquency (and with it rescission of the induction order predicated thereon) by purging his contumacy and complying with the duty he has breached, the Court could of course sustain the regulations subject to that constitutional emendation. Similarly, the Court can and has, even in the absence of separability clauses, upheld the basic provisions of statutes while voiding particular clauses as constitutionally offensive. See *United States* v. *Jackson*, 390 U.S. 570, 585–591; *Champlin Refining Co.* v. *Commission*, 286 U.S. 210, 234; cf *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 165 (Mr. Justice Frankfurter, concurring).

specific court orders—orders, moreover, which are appealable—not, as here, general duties imposed by generally applicable regulations. Again, whereas the incarcerated contempt respondent can terminate his confinement whenever he chooses, simply by deciding to obey the court's directive (cf. *Shillitani* v. *United States, supra,* 384 U.S. at 371; *Maggio* v. *Zeitz,* 333 U.S. 56, 76), a registrant who has been actually inducted under a delinquency induction order cannot secure his release from military discipline by deciding then to purge his delinquency; actual induction, under any hypothesis, marks the terminal point of his *locus poenitentiae.* Counterweighing the latter consideration, on the other hand, induction into the Armed Forces, unlike the coercive confinement to which the civil contemnor is liable, is an honorable status, as noted earlier, carrying no element of the stigma with which incarceration has always been associated. Such differences in the two procedures, however, serve merely to remind that it is an analogy, and no more, that is involved. The suggested analogy is a helpful one, though, and provides persuasive support for our contention that the delinquency procedures, both in conception and practical impact, are basically coercive and non-punitive in nature. And precisely for that reason, provided "the usual due process requirements are met," the "safeguards of indictment and jury" can constitutionally be dispensed with. *Shillitani* v. *United States, supra,* 384 U.S. at 371."

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" In *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, the petitioner conceded—indeed affirmatively urged—that "delinquency, properly viewed, is analogous to civil contempt" (Pet. Br., No. 46, 1968 Term, p. 52). He contended—as did the gov-

There is but one respect that occurs to us in which it is necessary to qualify the foregoing discussion. In some situations a local board could, without abuse of discretion, reject a registrant's attempt to correct his violation of duty and decline to remove him from delinquent status notwithstanding his promise, however sincere, to abide by his duties in the future. If, for example, through fraud, failure to keep the local board advised of relevant changes in status, or other breach of duty, the registrant had succeeded in

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ernment in that case and as hereinabove urged again—that the delinquency procedures prescribed by the regulations are "designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to induction" (*ibid.*). The sole respect in which Oestereich and the government differed on this point was as to the *scope* of the "procedures" with which the regulations seek to exact compliance. Oestereich argued that the delinquency regulations, properly viewed, are limited to compelling registrants to supply their local boards with the information needed in the "classification process," and that the duty of registrants to keep their draft cards in their possession is "unrelated to" that process (*id.* at 52, 55). In the instant case petitioner adopts the same position as an *alternative* argument. He renews Oestereich's claim that possession of the registration certificate is unrelated to the classification process and extends the argument to include possession of the classification notice (Pet. Br. 63–66). However, as noted in the government's preliminary memorandum in the *Oestereich* case (p. 8), registration is a necessary preliminary step to classification and induction, and the requirement of possession of one's registration certificate is calculated to make the entire system operate more effectively. That observation has, of course, equal if not greater applicability to the requirement of possession of one's classification certificate. See *United States* v. *O'Brien*, 391 U.S. 367, 378–381; and see *infra*, pp. 65–67. The limitation suggested by Oestereich and petitioner on the scope of the delinquency regulations is therefore unsound.

escaping a call to military service that would normally have been forthcoming, or had otherwise received a benefit under the Act to which he had not been entitled (cf. *United States* v. *Eisdorfer,* 299 F. Supp. 975 (E.D.N.Y.), pending on direct appeal, No. 330, this Term), the board could properly reject an offer to purge and decline to remove the delinquency. This would be particularly true where the registrant had in the meantime acquired a new status under the Act, on which an otherwise valid claim to deferment could be based, with the consequence that the promise to comply with future duties could safely be made without substantial risk of later induction. The issuance of an induction order to one so situated could properly be viewed as remedial—prevention of the registrant's profiting from his wrong. Cf. *Costello* v. *United States,* 365 U.S. 265; *Chaunt* v. *United States,* 364 U.S. 350. Since, however, neither the present case, the companion *Breen* case, nor the *Stewart* case, pending on direct appeal, No. 637, involves a situation of the type mentioned, further discussion of the applicable principles would appear unnecessary at this time.

ii. A second non-punitive purpose served by the delinquency regulations is the maintenance of *non*-delinquent registrants' morale. As pointed out earlier, it would not be feasible for the government to prosecute criminally every breach of duty under the Act and regulations, however relatively minor the violation. It would be out of the question, in other words, for every refusal of cooperation with the system, every manifested defiance, to be dealt with effectively through the ordinary criminal process. This being so,

some such device as that prescribed by the delinquency regulations is needed to foster the morale of those millions of registrants who strive in good faith to comply with their duties. Particularly during a period when, as now, the great problem is who should be required to serve when not all are needed—whether college students should be deferred and if so which categories and for how long, whether younger men or older men in the eligible age group should be taken first, whether marital status should be a relevant consideration and if so what its relative importance should be *vis-à-vis* other bases for deferment, and the like [45]—a factor which indubitably tends to bolster the morale of those upon whom the unwelcome obligation falls is the knowledge that those registrants who shirk their responsibilities and refuse to cooperate with the system at least do not profit from their delinquency. The realization that those who refuse such compliance are required under the law to "go first" helps ease the burden of compliance for those who, at whatever hardship, discharge their responsibilities under the Act and the regulations.[46]

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[45] The central nature of the problem of priorities is aptly epitomized in the title of the 1967 Report of the President's National Advisory Commission on Selective Service—*In Pursuit of Equity: Who Serves When Not All Serve.*

[46] That maintenance of morale can be a legitimate regulatory purpose of legislation was implicitly recognized by this Court, in a not dissimilar context, in *Kennedy* v. *Mendoza-Martínez*, *supra.* The dissenters in that case would have sustained the denationalization statute there in issue on precisely the ground that it represented a reasonable effort by Congress to sustain the morale of those millions of soldiers and civilians who did *not* flee from or remain without their country for the purpose

*d.* We earlier noted that one of the purposes of the delinquency regulations is admittedly to deter noncompliance with duty by those disposed to shirk their Selective Service obligations by confronting them with the unwelcome alternative of a speedier summons to service than they might normally expect. It does not follow, as petitioner urges (Pet. Br. 46), that the punitive character of the sanction is thereby demonstrated. That a purpose, even an important purpose, of a prescribed sanction is to discourage unlawful or unacceptable conduct is not inconsistent with the sanction's basically regulatory or remedial character. Many indisputably non-punitive sanctions have deterrence as a principal if not *the* principal end. Employment of the civil contempt sanction, whose objective is to coerce, not to punish, nonetheless tends to deter acts defiant or violative of court orders. Disbarment is another typically remedial sanction in which the deterrent factor looms large. Disbarment "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official minis-

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of avoiding their military obligations (372 U.S. at 209–210 (Justices Stewart and White); *id.* at 197 (Justices Harlan and Clark, concurring as to this point)). The majority alluded to the morale factor and impliedly recognized it as a legitimate non-punitive purpose, but concluded from an examination of the legislative history that in fact no such objective had motivated the provision's enactment (*id.* at 182). Cf. *Trop* v. *Dulles*, 356 U.S. 86, 122 (Justices Frankfurter, Burton, Clark, and Harlan, dissenting) (sustenance of troop morale a legitimate non-penal purpose of a statute providing for loss of nationality for desertion). In the instant case, where regulations, not a statute, create the sanction, there is of course no "legislative history" to examine to determine the motivation for the pertinent provisions.

tration of persons unfit to practise in them" (*Ex parte Wall,* 107 U.S. 265, 288). Yet who can doubt the deterrent effect of this most drastic of remedial devices on attorney misconduct? Cf. *Sacher* v. *Association of the Bar,* 347 U.S. 388; *In re Isserman,* 345 U.S. 286: *In re Osborn,* 376 F. 2d 808 (C.A. 6).

Similarly, deportation, another familiar regulatory device, "is [not] * * * punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz* v. *Adams,* 228 U.S. 585, 591; cf. *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276, 285; *Galvan* v. *Press,* 347 U.S. 522, 531; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594–595; *Mahler* v. *Eby,* 264 U.S. 32, 39. Yet the deterrent effect is obvious in a sanction that may be "the equivalent of banishment or exile" (*Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10) and may involve the "loss * * * of all that makes life worth living" (*Ng Fung Ho* v. *White,* 259 U.S. 276, 284). At least it is so with respect to the 14 (of 18) grounds of deportation which are for post-entry *conduct,* much of it criminal in nature (8 U.S.C. 1251(a)(4)–(9), (11)–(18)). Other civil sanctions similarly have a demonstrably deterrent effect on the forms of behavior with which they are concerned—for example, license revocation[47] (of which disbarment and deportation are of course but particular types, cf. *Helvering* v. *Mitchell,* 303

[47] Cf. *Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407 (second-class mail privilege); *Barsky* v. *Board of Regents,* 347 U.S. 442 (practice of medicine); *Hawker* v. *New York,* 170 U.S. 189 (same).

U.S. 391, 399 n. 2), denials of licenses or privileges,[48] postal fraud orders,[49] nuisance abatement,[50] and civil forfeitures and penalties of various kinds.[51] Many other such examples might be cited. Cf. Davis, *Administrative Law*, Sec. 19 (1951); Chamberlain, Dowling and Hays, *The Judicial Function in Federal Administrative Agencies*, ch. III, 79–163 (1942). Those mentioned will suffice, however, to show that it does not at all follow from the fact that a sanction has a deterrent purpose and impact that it is necessarily punitive in a constitutional sense. Much of the work of administrative agencies, as the last-cited treatises indicate, is concerned with the administration of just such sanctions.

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[48] Cf. *De Veau* v. *Braisted*, 363 U.S. 144 (denial to persons convicted of crime of right to hold office in waterfront organizations); *Garner* v. *Los Angeles Board*, 341 U.S. 716 (denial of privilege of public employment to persons who have engaged in subversive activity); *Adler* v. *Board of Education*, 342 U.S. 485 (same); *Beilan* v. *Board of Education*, 357 U.S. 399 (same).

[49] Cf. *Public Clearing House* v. *Coyne*, 194 U.S. 497; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94.

[50] Cf. *Lawton* v. *Steele*, 152 U.S. 133.

[51] Cf. *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (liquidated damages in amount of statutorily fixed sum for defrauding government); *Helvering* v. *Mitchell*, 303 U.S. 391, 398–405 (50 percent deficiency assessment for fraudulently understating tax due); *Hepner* v. *United States*, 213 U.S. 103 (monetary forfeiture for inducing alien to migrate to United States to perform labor); *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329 (money penalty against steamship company for bringing inadmissible alien to United States); *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320 (same).

*3. The delinquency regulations are not invalid for failure to provide procedural due process*

Petitioner argues that the delinquency regulations, even if they do not impose punishment, are invalid for failure to provide procedural due process (Pet. Br. 49–51). There is no substance to that claim. The twin minimum essentials of due process, notice and hearing, are amply provided for. The provision for notice is express (32 C.F.R. 1642.4(b)). While there is no explicit provision for a hearing, the regulations plainly contemplate that the recipient of a delinquency notice who desires a hearing will be given one. The delinquency notice form (SSS Form No. 304) informs the registrant of the fact that he has been declared delinquent; specifies the duty or duties for breach of which the declaration was made; directs the registrant to report to his board immediately (or take the notice to the board nearest him) for advice as to what he should do; informs him of the criminal consequences of "willful" failure to perform the duty in question; and warns him of the possibility that he may be classified I–A as a delinquent and ordered to report for induction (A. 44; *supra,* p. 20). The clear implication of these instructions and warnings, read in the light of the provision of 32 C.F.R. 1642.4 (c) that a declared delinquent "may be removed from that status by the local board at any time," is that the registrant will be heard on the charges, if he desires to be, before significant substantive action is taken—before, that is, he is reclassified I–A (if he is not already in that class) or an order for expedited induction is issued.

It is true that the regulations are silent as to the incidents of such a hearing should the registrant indicate he desires one.[52] There is no occasion here, however, to consider what the minimum essentials required by the Constitution might be for such a hearing in the event one were sought. For petitioner, who took no action whatever in response to his delinquency notice, plainly lacks standing to raise such issues in this case. It will be time enough to consider the *type* of hearing required by due process when a registrant who seeks such a hearing is denied one, or as full a one as he believes he is entitled to. In petitioner's posture, such questions as whether the registrant at such a hearing has a right to "confrontation and cross-examination," "public trial," "compulsory process," and "proof beyond a reasonable doubt" (Pet. Br. 50) are wholly theoretical.

By the same token, petitioner's implied suggestion that the order directing him to report for induction followed too soon after the service of the delinquency notice (Pet. Br. 5, 64) is also without merit. The induction order was issued five days after the mailing of the delinquency notice (*supra,* p. 5). In the absence of any indication that petitioner wished a hearing—he does not even now make such a representa-

[52] Depending upon what the situation might be, the recipient of such a notice, as previously indicated, might wish to deny that he had been delinquent and to be confronted with the evidence of the claimed defalcation. Or he might wish to acknowledge the delinquency and take such steps as might be necessary to clear up his default and effect the removal of this status (see *supra*, pp. 50–54, incl. N. 38).

tion—he is obviously in no position to complain that he was prejudiced by the brevity of the interval.

*4. The delinquency regulations are not unconstitutionally vague or overbroad*

Petitioner's contention that the delinquency regulations are impermissibly vague and overbroad (Pet. Br. 35–43) is also without merit. The regulations authorize reclassification and acceleration of the induction of a registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)). This language thus simply incorporates the provisions of the Selective Service Act and regulations imposing certain duties on registrants, and petitioner has not shown that any of these provisions is unacceptably vague. In particular, the duty involved in this case—the obligation to carry a registration and a classification card at all times (32 C.F.R. 1617.1, 1623.5)—is specific and narrowly defined.

Petitioner argues, however, that the regulations must fail for vagueness because they give to the local boards unbounded discretion whether and under what circumstances to declare a registrant delinquent, and leave them similarly unguided as to when and whether a declared delinquency shall be removed (Pet. Br. 7–8, 35–37). This contention is likewise unsound. Clearly the discretion which a board possesses whether to *issue* a declaration of delinquency presents no constitutional problem. That discretion is in every respect comparable to that of a prosecuting attorney whether to institute criminal proceedings under the Act for a devia-

tion by a registrant from duty (by definition an offense)—or indeed whether to prosecute for any offense under any statute. It has never been supposed that the existence of such prosecutorial discretion presents a sound objection to the enforcement of the criminal law. The perhaps more serious objection, cf. *United States* v. *Eisdorfer, supra,* 299 F. Supp. at 988–989, that a board has unfettered discretion whether and under what circumstances to rescind a declared delinquency, is obviated by acknowledging (see *supra,* pp. 52–54) that it would be an abuse of discretion for a board to refuse removal from that status where the registrant makes a good faith and timely effort to clear up his delinquency and return to compliance with his duties. Where the registrant has it within *his* power to effect the removal of his delinquency through purging and giving satisfactory assurances of nonrepetition, the argument based on the assumed guidelessness of board discretion ceases to have force.

*5. As applied to the duty of registrants to maintain possession of their draft cards, the delinquency regulations do not infringe First Amendment liberties*

Nor is there merit to petitioner's claim that, as applied to the duty of registrants to maintain their draft cards in their possession, the delinquency regulations conflict with the protections of the First Amendment (Pet. Br. 51–58). That issue was settled in substance by *United States* v. *O'Brien,* 391 U.S. 367, 377–381. Petitioner's claim that he had a right to "turn in" his draft cards as a gesture of political protest differs in no essential way from O'Brien's claim that he had a right to burn his draft certificates as a similar act of

"symbolic speech." That claim was rejected in *O'Brien* (391 U.S. at 376–377, 381-382). It is immaterial that *O'Brien* involved the destruction of certificates, not merely their non-possession, since it is apparent that a certificate which a registrant discards or abandons, as in this case, is as useless to him and the Selective Service System as if he burned or otherwise destroyed it.

The *O'Brien* opinion lists (*id.* at 378–380) some of the significant purposes served by the certificates. To them might be added another, suggested by recurrent reports of deliberate destruction of draft board files and records by persons "protesting" against conscription and the Vietnam conflict.[53] Where a board's files are lost or destroyed, whether through design or natural disaster, previously issued registration and classification cards might well be useful to the board in reconstructing its files—provided they have been retained by registrants in accordance with the requirement of the regulations. Cf. *United States* v. *Miller*, 367 F. 2d 72, 81 (C.A. 2), certiorari denied, 386 U.S. 911. A destroyed or discarded certificate would obviously be useless for this purpose. At all events, petitioner was not prosecuted for dispossessing himself of his draft cards, but rather for refusing to submit to induction.

Petitioner's real quarrel, it is apparent (see Pet. Br. 51–54), is not with the regulations, but with

[53] *E.g.*, New York Times, May 18, 1968, p. 36 (Baltimore); *id.*, September 25, 1968, p. 5 (Milwaukee); *id.*, May 26, 1969, p. 8 (Chicago); Washington Post, May 22, 1969, p. D1 (Silver Spring, Maryland).

General Hershey's recommendations, specifically his letter of October 26, 1967, in which he gave an expansive interpretation to the regulations as authorizing delinquency reclassification for illegal activity *in general* which "interferes with recruiting" or "causes refusal of duty" in the Armed Forces (Pet. Br. App. 18–20). There is no occasion in this case, however, to explore the propriety or ramifications of that interpretation. Cf. *National Student Ass'n* v. *Hershey*, 412 F.2d 1103 (C.A.D.C.). For the trial judge in this case, in his fact-finding capacity at the juryless trial, found that petitioner had been declared delinquent and ordered to report for induction, not by reason of General Hershey's letter, but solely because of his non-possession of his draft cards, in violation of the regulations (*supra*, pp. 7–8).[54]

[54] Petitioner acknowledges that his suggestion that the board's action in this case was "premised upon the Hershey directive" is conjectural, based on the fact that the induction order followed "so closely * * * upon [the directive's] distribution" (Pet. Br. 52). In point of fact, the induction order was issued some two months after the distribution of General Hershey's letter (*supra*, pp. 5, 6–7). It was sent, moreover, more than two weeks after the issuance by General Hershey and the then Attorney General of a joint statement making it abundantly clear that delinquency reclassification is permitted only when a registrant "violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or failing to have a draft card," and that "[l]awful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration [of induction] or any other special administrative action by the Selective Service System." See Joint Statement of December 9, 1967, reprinted in Appendix B to our brief in the companion *Breen* case, No. 65, this Term.

E. THE DECLARATION OF DELINQUENCY AND THE RESULTING INDUCTION ORDER WERE AUTHORIZED BY THE REGULATIONS THEMSELVES

There is no substance to petitioner's claim that the board's declaration of delinquency and order directing him to report for accelerated induction on the basis thereof were unauthorized by the delinquency regulations themselves (Pet. Br. 61–66).

1. Petitioner contends that non-possession by a registrant of his draft cards, viewed as a criminal offense, is punishable, if at all, under Section 12(b)(6) of the Act (50 U.S.C. App. 462(b)(6)),[55] not Section 12(a) (50 U.S.C. App. 462(a)).[56] He argues from that premise that "since possession is not a 'duty' under § 12(a), it is not a 'duty' under Part 1642 of the Regulations [*i.e.*, the delinquency provisions]" (Pet. Br. 61–62). That argument is without merit. 32 C.F.R. 1617.1 provides that every registrant "must" have his registration certificate in his possession at all times. 32 C.F.R. 1623.5 states that every classified registrant "must" have his classification notice in his possession

[55] That subsection provides: "(b) Any person * * * (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate [*i.e.*, any certificate issued pursuant to the title or rules and regulations] shall [be punished by a fine of not more than $10,000 or imprisoned for not more than five years, or both]."

[56] In pertinent part, that subsection provides: "(a) Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made * * * thereunder, who shall knowingly fail or neglect to perform such duty * * * shall [be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both]."

at all times. Each of these regulations creates a "duty", for failure to perform which, under 32 C.F.R. 1642.4(a), he may be declared delinquent by his local board.[57] It is immaterial whether, viewed as a penal matter, non-possession is punishable under Section 12(a) or Section 12(b)(6)—the penalty under each of which provisions, it may incidentally be noted, is identical. *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), the sole authority cited by petitioner for his suggestion that the question as to which penal clause is applicable is relevant (Pet. Br. 62), is in no way germane.[58]

2. Petitioner alternatively argues that the only kind of "duty" under the regulations for failure to perform which a local board may declare a registrant delinquent is one that is "relevant to the classification process," or that constitutes "an integral part of the relationship between the registrant and the board," and that the regulations requiring registrants to carry their draft cards at all times do not impose a duty of either description (Pet. Br. 63–66).[59] Even

[57] Petitioner's suggestion that 32 C.F.R. 1617.1 and 1623.5 impose no duty because they "do not contain either the word 'duty' or the word 'shall'" (Pet. Br. 63; cf. Pet. Br. 43) is patently unsound. As noted, they both contain the word "must".

[58] What the *Wolff* court remarked was that "no regulation authorizes a draft board to declare a registrant a delinquent" for violating that part of Section 12(a) (50 U.S.C. App. 462(a)) which proscribes "knowingly hinder[ing] or interfer[ing] * * * with the administration of" the Act (372 F. 2d at 821)—a clause not relevant to the present discussion (see note 56, *supra*).

[59] Substantially the same argument was made by the petitioner in the *Oestereich* case, but there only in regard to the duty to retain registration certificates (see note 44, *supra*).

assuming that there is no rational relationship between the possession requirement and the classification and other functions of local boards (but see note 44, *supra*), it does not follow that the declaration of delinquency was unauthorized in this case, or is *ultra vires* generally.

The answer to petitioner's contention is that the regulations do not limit the duties whose breach constitutes delinquency to those that assist the boards in their classifying function or other specific responsibilities under the Act. The regulations make the failure to perform "any duty" required of registrants under the Selective Service law a basis for a determination of delinquency (32 C.F.R. 1602.4, 1642.4(a)). It is undisputed that the regulations require registrants to keep their draft cards in their possession at all times and that petitioner failed to comply with that duty. That made him a delinquent under the regulations and warranted the issuance of the accelerated induction order.[60]

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[60] Petitioner's contention that *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, directly governs this case (Pet. Br. 59–61) is also unsound. *Oestereich* involved the delinquency reclassification of a registrant who enjoyed exempt status under the Act. (see *supra*, pp. 29, 32, 37–38). The Court accordingly held that the board's action had been "basically lawless" (393 U.S. at 237). And the fact that Congress, in 1967, in effect "froze" the currently effective "order of call" provisions of the regulations into law by prohibiting the President from making any changes therein without specific statutory authority (Section 5(a)(2) (50 U.S.C. App. (Supp. IV) 455(a)(2)); see *supra*, pp. 36–37), in no way supports petitioner's position (see Pet. Br. 60). The congressional action related solely to the relative order of

II. THE GOVERNMENT ADEQUATELY ESTABLISHED THAT PETITIONER WILLFULLY FAILED TO SUBMIT TO INDUCTION

There is no substance to petitioner's contention that the government did not prove at the trial that he willfully failed to submit to induction (Pet. Br. 66-76). The proof was fatally defective, petitioner argues, because it failed to include a showing that he was given opportunity to take the ceremonial "one step forward" that symbolically marks the transition from civilian to military status (AR [Army Regulation] 601-270, paragraph 37*a*, quoted at Pet. Br. 68, n. 31a). The contention misconstrues what "submitting to induction" comprises. It is true that the taking of the "one step forward" marks the *culmination* of the induction process, but induction is just that—a process. Paragraph 13*g* of the cited Army Regulation defines "induction" as

> [t]he *procedure* consisting of the *physical inspection* (or, if appropriate, the complete medical examination), *mental testing* (if not already accomplished), the completion of records and *necessary processing to complete the transition* from civilian to military status * * * [emphasis added].

It was precisely this "processing" to which petitioner refused to submit (*supra*, p. 6). Paragraph 37*a* itself, on which petitioner relies, provides that the "one step forward" ceremony be conducted only for those

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induction as regards "age groups"; it in no way affected the powers with respect to delinquents. Quite to the contrary, those powers, as argued previously, were confirmed and ratified.

registrants "who have been determined to be fully qualified for induction * * *." Petitioner refused to take part in *any* of the processes, including physical and mental examinations, designed to test whether he was qualified for induction. It would hardly be appropriate to require induction center personnel to ask a registrant to take the ceremonial step forward when he had refused to submit to the very processes that are designed to test his acceptability to the Armed Forces.[61] Petitioner's conviction for refusing to comply with the directive of his board that he submit to induction was therefore proper. Cf. *Williams* v. *United States,* 203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003.

*Chernekoff* v. *United States,* 219 F. 2d 721 (C.A. 9), relied on by petitioner (Pet. Br. 73–74), does not support his position. There a registrant who had, apparently, been *found qualified for service* refused in writing to be inducted, but was neither given the op-

[61] This is particularly true where, as in petitioner's case, the registrant has not been given a pre-induction physical examination (delinquent registrants as well as volunteers are excepted from the requirement of such an examination, see 32 C.F.R., 1628.10, 1631.7(a) and (b)). Indeed, since petitioner, had he participated in the examination processes which normally precede induction, might have been rejected for service, a question would normally arise as to whether he had sufficiently exhausted his administrative remedies. See *Falbo* v. *United States*, 320 U.S. 549, 554; *Estep* v. *United States*, 327 U.S. 114, 123; *Gibson* v. *United States*, 329 U.S. 338, 343–350; cf. *McKart* v. *United States*, 395 U.S. 185, 202–203. Since, however, the government did not raise the exhaustion issue at trial—on the contrary, it conceded that petitioner had sufficiently pursued the administrative course (Tr. 71)—we do not seek to rely on that point now.

portunity to take the ceremonial step that traditionally marks acceptance of induction, *nor warned of the consequences* of his refusal to do so. The Ninth Circuit reversed his conviction on the ground that he had not been given the "last clear chance," contemplated by the Army regulations, to change his mind and accept induction rather than possible conviction for a felony (219 F. 2d at 725). The court indicated, however, that it would have reached the opposite result—as it had in fact done in an earlier case (*Bradley* v. *United States,* 218 F. 2d 657 (C.A. 9), reversed on other grounds, 348 U.S. 967)—had the registrant been warned of the consequences of his refusal (*ibid.*). Here the record shows that petitioner was amply warned of the criminal consequences of his refusal, and that he still declined to submit to any of the requisite processing (see *supra,* p. 6). In these circumstances, as the courts below properly concluded (A. 27–29, 34–35), petitioner was accorded all the opportunity to which he was entitled to comply with the order to submit to induction, but refused to cooperate in any respect.

### III. THE INDICTMENT IS NOT DUPLICITOUS

There is no merit to petitioner's contention that the indictment should have been dismissed as duplicitous (Pet. Br. 77–81). The indictment charged a single offense—failure to comply with an order of the local board (A. 2). That the order required petitioner to do two things—report for and submit to induction—did not make the charge duplicitous. Cf. *Billings* v. *Truesdell,* 321 U.S. 542, 557, on which the court of

appeals properly relied (A. 34–35), where this Court stated: "The order of the local board to report for induction includes a command to submit to induction." And see *Estep* v. *United States*, 327 U.S. 114, 119. Analogously, a single conspiracy may have several objects. *Braverman* v. *United States*, 317 U.S. 49, 53–54. The undisputed evidence showed that petitioner reported at the induction station, thereby complying with that aspect of the directive, but willfully failed to submit to induction, thus violating the order viewed as a totality. There is no indication, nor indeed does it appear to be seriously suggested, that petitioner was in any way prejudiced in presenting his defense by the form in which the indictment was drawn. His claim in this regard is thus wholly lacking in substance.

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOHN N. MITCHELL,
*Attorney General.*
WILL WILSON,
WILLIAM D. RUCKELSHAUS,
*Assistant Attorneys General.*
PHILIP R. MONAHAN,
*Attorney.*

OCTOBER 1969.

## APPENDIX A

Section 1631.7 of the Selective Service regulations (32 C.F.R. 1631.7), not reprinted by petitioner, provides in pertinent part:

§ 1631.7 *Action by local board upon receipt of notice of call.*

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I–A and Class I–A–O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I–A or Class I–A–O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further,* That a registrant classified in Class I–A or Class I–A–O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability

(DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and who have no [*sic*] attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date of this amended subparagraph [August 26, 1965] and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date of this amended subparagraph [August 26, 1965] and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

* * * * *

(b) When a call is placed with designation of age group or groups, each local board, upon

receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I–A and Class I–A–O and who have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction; *Provided,* That a registrant classified in Class I–A or Class I–A–O who is delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further,* That a registrant classified in Class I–A or Class I–A–O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Registrants in the designated age group; and registrants who previously have been deferred in Class I–S–C after attaining the age of 19 years, or who have requested and have been granted a deferment in Class II–S after the enactment of the Military Selective Service Act of 1967, and who are no longer deferred,

shall be considered as being within the age group called regardless of their actual age. These registrants shall be integrated and called according to the month and day of their birth, the oldest first. Registrants who have been deferred in Class I–S–C or Class II–S and have been integrated with a prime age group under the provisions of this paragraph shall, for the purposes of selection and call, thereafter be considered a member [*sic*] of such age group.

* * * * *

## APPENDIX B

General Hershey's reply to Congressman Stafford's inquiries concerning the use of the draft for punitive purposes (Hearings before the Committee on Armed Services, House of Representatives, 89th Congress, Second Session, June 22, 23, 24, 28, 29 and 30, 1966, *Review of the Administration and Operation of the Selective Service System* [Doc. No. 75], pp. 9897–9904):

CORRESPONDENCE SUBMITTED BY HON. ROBERT T. STAFFORD, REPRESENTATIVE FROM VERMONT

JULY 8, 1966.

Lt. Gen. LEWIS B. HERSHEY,
*Director, Selective Service System,*
*Washington, D.C.*

DEAR GENERAL HERSHEY: As you will recall, during Committee hearings on the operation and administration of the Selective Service System, I suggested that those members who have questions which remained unanswered have the opportunity of forwarding them to you in writing so as to enable you to provide them with a reply.

I am in receipt of certain of these communications from members of the Committee, including one from Congressman Robert T. Stafford dated June 27, 1966.

My purpose in writing you, therefore, is to reemphasize my understanding that you will provide these members with a written response to their interrogatories and furnish the Committee with a copy of the specific correspondence so that it may be made a part of the official record on these hearings.

Sincerely,

L. MENDEL RIVERS,
*Chairman.*

NATIONAL HEADQUARTERS,
SELECTIVE SERVICE SYSTEM,
OFFICE OF THE DIRECTOR,
*Washington, D.C., July 13, 1966.*

Hon. L. MENDEL RIVERS,
*Chairman, Committee on Armed Services,*
*House of Representatives.*

DEAR MR. CHAIRMAN: I have your letter of July 8, 1966, concerning questions which may be submitted by letter by members of the Committee in connection with the current posture hearings on Selective Service.

I have received a letter from Congressman Robert T. Stafford listing a number of questions. I have acknowledged his letter, and written replies to his questions are being drafted.

The response to Congressman Stafford's question will be supplied to him shortly, with a copy to the Committee, as you request. Any other written questions received will be similarly treated.

Sincerely yours,

LEWIS B. HERSHEY,
*Director.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
*Washington, D.C., June 27, 1966.*

Lt. Gen. LEWIS B. HERSHEY,
*Director, Selective Service System,*
*Washington, D.C.*

MY DEAR GENERAL HERSHEY: In accordance with the motion to which I understand the Committee agreed, made by the Honorable William H. Bates before the full Committee during your appearance as a witness, that Members might submit questions in writing for answer on your part, I herewith submit the following questions for response at your earliest convenience:

* * * * *

17. Should the draft be used for punitive purposes?

18. Should Selective Service have the authority to change a man's draft classification on the basis of its own judgment that he has violated Selective Service laws or regulations?

* * * * *

Sincerely yours,

ROBERT T. STAFFORD,
*Member of Congress.*

NATIONAL HEADQUARTERS,
SELECTIVE SERVICE SYSTEM,
OFFICE OF THE DIRECTOR,
*Washington, D.C., July* 21, 1966.

Hon. L. MENDEL RIVERS,
*Chairman, Committee on Armed Services,*
*House of Representatives.*

DEAR MR. CHAIRMAN: Attached, in compliance with your letter of July 8, 1966, and my interim reply of July 13, 1966, is a copy of my letter to Congressman Robert T. Stafford together with a copy of the responses to the questions he asked.

I trust this will meet your needs.

Sincerely yours,

LEWIS B. HERSHEY,
*Director.*

* * * * *

17. Should the draft be used for punitive purposes?

Selective service should not be used for punitive purposes if by that it is ment [*sic*] that one should be inducted into the armed forces as punishment for an offense which is not related to selective service.

When a man has violated the selective service law itself, the acceleration of his processing toward induction is not deemed to be "punitive." The law has placed the obligation to serve on virtually every man within the liable ages. Service

is characterized in the law, properly, as a privilege and a duty.

Except in the most flagrant cases, a violator of the selective service law will not be prosecuted if he is later willing to comply with the law by submitting to induction. The acceleration of processing for one who has violated the selective service law is merely a means of giving him an early opportunity to comply with the law rather than to be prosecuted. The accelerated processing involves reclassification of delinquents who are deferred into Class I–A by the local board. The registrant may appeal this classification.

Every registrant is presumed to be available for service unless he demonstrates to the satisfaction of the local board that the national interest requires his temporary deferment. The local board properly may consider whether a deferred registrant who violates the selective service law continues to serve the national interest.

18. Should Selective Service have the authority to change a man's draft classification on the basis of its own judgment that he has violated Selective Service laws or regulations?

In keeping with the policy that a delinquent normally should not be prosecuted if he is willing to comply with the law by submitting to induction, it is necessary that selective service boards when convinced that a man has violated the selective service law have authority to reclassify him and give him an opportunity to report for induction before referring him to the United States Attorney for prosecution. The only other alternative would be to require the boards to report a registrant for prosecution in every instance where there [*sic*] believe he has violated the law. It must be remembered that in almost every case the question whether a registrant has violated the law or regulations really does not involve the exercise of judgment. There is little in the way of independent

judgment involved when a determination is made that a man has not registered, has not kept the board advised of a change of address, has not kept the board advised of circumstances affecting his classification, has not reported for preinduction physical examination, or has not reported for induction; and these represent 99% or more of the violations. When the local board is criticized when it accelerates the processing of a registrant who is believed to be delinquent, it is too often forgotten that if the registrant refuses induction, his case will go to the court and he will then get as much judicial attention as he would have had if he had been referred there in the first instance.

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